



राजपत्र, हिमाचल प्रदेश

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, बुधवार, 15 दिसम्बर, 2010 / 24 अग्रहायण, 1932

हिमाचल प्रदेश सरकार

LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

Shimla-2, 2010

No. Sharm (A) 7-1/2005 (Award).—In exercise of the powers vested in him under section 17(1) of the Industrial Disputes Act, 1947, the Governor Himachal Pradesh is pleased to order the publication of awards announced by the Presiding Officer, Labour Court, Dharamshala of the following cases on the website of Labour & Employment Department:-

Sr. No.	Case No.	Title of the Case	Date of Award
1.	27/2008	S/Shri Amin Chand Vs HPPWD.	24-04-2010
2.	341/2008	Kamli Devi Vs HPPWD.	24-04-2010
3.	157/2007	Desh Raj Vs Director of Agriculture	27-04-2010
4.	65/2005	Jagdish Chand Vs DFO	27-04-2010
5.	8/2008	Rajesh Kumar Vs HPPWD.	27-04-2010
6.	195/2007	Chaman Lal Vs Director of Agriculture	27-04-2010
7.	58/2006	Jai Ram Vs HPPWD	27-04-2010

Sr. No.	Case No.	Title of the Case	Date of Award
8	82/2006	Bachnu Ram Vs DFO	28-04-2010
9	330/2009	Balak Ram Vs HPPWD, Dharampur.	30-04-2010
10	328/2009	Duni Chand Vs HPPWD, Dharampur.	30-04-2010
11	285/2009	Rakesh Kumar Vs HPPWD, Dharampur.	30-04-2010
12	167/2009	Shakuntla Devi Vs HPPWD, Dharampur.	30-04-2010
13	323/2009	Daman Singh Vs HPPWD, Dharampur.	30-04-2010
14	297/2009	Malka Devi Vs HPPWD, Dharampur.	30-04-2010
15	296/2009	Beli Ram Vs HPPWD, Dharampur.	30-04-2010
16	294/2009	Ramesh Chand Vs HPPWD, Dharampur.	30-04-2010
17	293/2009	Chet Ram Vs HPPWD, Dharampur.	30-04-2010
18	333/2009	Meera Devi Vs HPPWD, Dharampur.	30-04-2010
19	299/2009	Jawala Ram Vs HPPWD, Dharampur.	30-04-2010
20	300/2009	Des Raj Vs HPPWD, Dharampur.	30-04-2010
21	251/2009	Pitamber Lal Vs HPPWD, Dharampur.	30-04-2010
22	29/2009	Roshni Devi Vs HPPWD, Dharampur.	30-04-2010
23	321/2009	Sunil Kumar Vs HPPWD, Dharampur.	30-04-2010
24	283/2009	Abdul Rajjak Vs HPPWD, Dharampur.	30-04-2010
25	301/2009	Jayoti Ram Vs HPPWD, Dharampur.	30-04-2010
26	326/2009	Surender Kumar Vs HPPWD, Dharampur.	30-04-2010
27	317/2009	Amar Singh Vs HPPWD, Dharampur.	30-04-2010
28	218/2009	Uday Vs HPPWD, Dharampur.	30-04-2010
29	281/2009	Mansa Ram Vs HPPWD, Dharampur.	30-04-2010
30	89/2009	Sukh Dev Vs HPPWD, Dharampur.	30-04-2010
31	325/2009	Gandhi Ram Vs HPPWD, Dharampur.	30-04-2010
32	357/2009	Prithi Singh Vs HPPWD, Dharampur.	30-04-2010
33	282/2009	Inder Pal Vs HPPWD, Dharampur.	30-04-2010
34	499/2008	Deva Nand Vs HPPWD, Dharampur.	01-05-2010
35	220/2008	Dhan Dev Vs HPPWD, Dharampur.	01-05-2010
36	507/2008	Gain Chand Vs HPPWD, Dharampur.	01-05-2010
37	362/2008	Brahmi Devi Vs HPPWD, Dharampur.	01-05-2010
38	373/2008	Reeta Devi Vs HPPWD, Dharampur.	01-05-2010
39	367/2008	Soma Devi Vs HPPWD, Dharampur.	01-05-2010
40	309/2008	Amar Nath Vs HPPWD, Dharampur.	01-05-2010
41	323/2008	Shanta Devi Vs HPPWD, Dharampur.	01-05-2010
42	428/2008	Geeta Devi Vs HPPWD, Dharampur.	01-05-2010
43	415/2008	Bohri Devi Vs HPPWD, Dharampur.	01-05-2010
44	217/2008	Bhola Shankar Vs HPPWD, Dharampur.	01-05-2010
45	554/2008	Kamal Kant Vs HPPWD, Dharampur.	01-05-2010
46	336/2008	Kamla Devi Vs HPPWD, Dharampur.	01-05-2010
47	526/2008	Ram Singh Vs HPPWD, Dharampur.	01-05-2010
48	500/2008	Kewal Krishan Vs HPPWD, Dharampur.	01-05-2010
49	212/2008	Ram Nath Vs HPPWD, Dharampur.	01-05-2010
50	450/2008	Des Raj Vs HPPWD, Dharampur.	01-05-2010
51	471/2008	Dharam Pal Vs HPPWD, Dharampur.	01-05-2010
52	332/2008	Raman Chand Vs HPPWD, Dharampur.	01-05-2010
53	293/2008	Jai Singh Vs HPPWD, Dharampur.	01-05-2010
54	358/2008	Lajjo Devi Vs HPPWD, Dharampur.	01-05-2010
55	442/2008	Rajo Devi Vs HPPWD, Dharampur.	01-05-2010
56	472/2008	Roshani Devi Vs HPPWD, Dharampur.	01-05-2010
57	104/2004	Man Singh Vs DFO, Chamba.	01-05-2010
58	101/2002	Lehar Singh Vs DFO, Chamba.	04-05-2010
59	23/2006	Gujja Ram Vs HPPWD, Bilaspur.	06-05-2010
60	498/2004	Vishav Dev Vs HPPWD, Ghumarwin.	07-05-2010
61	88/2005	Anklesh Kumar Vs HPPWD, Ghumarwin.	07-05-2010
62	149/2006	Pritam Chand Vs DFO.	07-05-2010
63	143/2008	Sidhu Ram Vs DFO.	07-05-2010
64	87/2007	Sahab Singh Vs HPPWD.	07-05-2010
65	176/2007	Ram Singh Vs DFO Dehra.	15-05-2010
66	21/2008	Ramesh Chand Vs M/S Shankar Board.	17-05-2010
67	99/2005	Malkeet Singh Vs Sood Steel.	17-05-2010
68	75/2009	Lajja Devi Vs HPPWD, Dharampur.	20-05-2010

Sr. No.	Case No.	Title of the Case	Date of Award
69.	327/2009	Ridku Ram Vs HPPWD, Dharampur.	20-05-2010
70.	279/2009	Bhoop Singh Vs HPPWD, Dharampur.	20-05-2010
71.	264/2009	Kashmir Singh Vs HPPWD, Dharampur.	20-05-2010
72.	94/2009	Kehar Singh Vs HPPWD, Dharampur.	20-05-2010
73.	43/2009	Savitri Devi Vs HPPWD, Dharampur.	20-05-2010
74.	06/2009	Om Chand Vs HPPWD, Dharampur.	20-05-2010
75.	257/2009	Hans Raj Vs HPPWD, Dharampur.	20-05-2010
76.	258/2009	Parkash Chand Vs HPPWD, Dharampur.	20-05-2010
77.	262/2009	Soma Devi Vs HPPWD, Dharampur.	20-05-2010
78.	169/2009	Nathu Ram Vs HPPWD, Dharampur.	20-05-2010
79.	171/2009	Rumali Bibi Vs HPPWD, Dharampur.	20-05-2010
80.	5/2009	Raju Ram Vs HPPWD, Dharampur.	20-05-2010
81.	31/2009	Satya Devi Vs HPPWD, Dharampur.	20-05-2010
82.	210/2009	Ashok Kumar Vs HPPWD, Dharampur.	20-05-2010
83.	643/2009	Pritam Singh Vs HPPWD, Dharampur.	20-05-2010
84.	93/2009	Kamal Singh Vs HPPWD, Dharampur.	20-05-2010
85.	59/2009	Dharam Pal Vs HPPWD, Dharampur.	20-05-2010
86.	199/2009	Dharam Veer Vs HPPWD, Dharampur.	20-05-2010
87.	238/2009	Sanjay Kumar Vs HPPWD, Dharampur.	20-05-2010
88.	247/2009	Ramesh Chand Vs HPPWD, Dharampur.	20-05-2010
89.	16/2009	Des Raj Vs HPPWD, Dharampur.	20-05-2010
90.	27/2009	Roshan Lal Vs HPPWD, Dharampur.	20-05-2010
91.	378/2009	Lakshmi Devi Vs HPPWD, Dharampur.	20-05-2010
92.	267/2009	Kailasho Devi Vs HPPWD, Dharampur.	20-05-2010
93.	9/2009	Satya Devi Vs HPPWD, Dharampur.	20-05-2010
94.	245/2009	Jameel Khan Vs HPPWD, Dharampur.	20-05-2010
95.	96/2009	Gulab Singh Vs HPPWD, Dharampur.	20-05-2010
96.	602/2009	Kishori Lal Vs HPPWD, Dharampur.	20-05-2010
97.	48/2009	Pardeep Kumar Vs HPPWD, Dharampur.	20-05-2010
98.	47/2009	Kamli Devi Vs HPPWD, Dharampur.	20-05-2010
99.	46/2009	Balbir Singh Vs HPPWD, Dharampur.	20-05-2010
100.	67/2009	Sarwan Kumar Vs HPPWD, Dharampur.	20-05-2010
101.	55/2009	Raju Ram Vs HPPWD, Dharampur.	20-05-2010
102.	165/2009	Sanjeev Vs HPPWD, Dharampur.	20-05-2010
103.	170/2009	Kamla Vs HPPWD, Dharampur.	20-05-2010
104.	1/2009	Subhash Vs HPPWD, Dharampur.	20-05-2010
105.	36/2009	Barfi Devi Vs HPPWD, Dharampur.	20-05-2010
106.	225/2009	Phula Devi Vs HPPWD, Dharampur.	20-05-2010
107.	168/2009	Kamla Devi Vs HPPWD, Dharampur.	20-05-2010
108.	126/2009	Taqdir Singh Vs HPPWD, Dharampur.	20-05-2010
109.	52/2009	Gurdev Vs HPPWD, Dharampur.	20-05-2010
110.	82/2009	Chatar Singh Vs HPPWD, Dharampur.	20-05-2010
111.	85/2009	Prem Chand Vs HPPWD, Dharampur.	20-05-2010
112.	114/2009	Rakesh Kumar Vs HPPWD, Dharampur.	20-05-2010
113.	80/2009	Chander Pal Vs HPPWD, Dharampur.	20-05-2010
114.	449/2008	Shakuntla Devi Vs HPPWD, Dharampur.	20-05-2010
115.	598/2008	Champa Devi Vs HPPWD, Dharampur.	20-05-2010
116.	119/2009	Kashmir Singh Vs HPPWD, Dharampur.	20-05-2010
117.	242/2009	Brij Lal Vs HPPWD, Dharampur.	20-05-2010
118.	39/2009	Kalawati Vs HPPWD, Dharampur.	20-05-2010
119.	158/2009	Tarsem Singh Vs HPPWD, Dharampur.	20-05-2010
120.	74/2009	Daler Singh Vs HPPWD, Dharampur.	20-05-2010
121.	58/2009	Ram Lal Vs HPPWD, Dharampur.	20-05-2010
122.	57/2009	Dalip Singh Vs HPPWD, Dharampur.	20-05-2010
123.	56/2009	Krishan Chand Vs HPPWD, Dharampur.	20-05-2010
124.	63/2009	Nanku Ram Vs HPPWD, Dharampur.	20-05-2010
125.	64/2009	Amar Singh Vs HPPWD, Dharampur.	20-05-2010
126.	66/2009	Rattan Chand Vs HPPWD, Dharampur.	20-05-2010
127.	131/2009	Roshan Lal Vs HPPWD, Dharampur.	20-05-2010
128.	3/2009	Dharam Pal Vs HPPWD, Dharampur.	20-05-2010
129.	79/2009	Parkash Chand Vs HPPWD, Dharampur.	20-05-2010

Sr. No.	Case No.	Title of the Case	Date of Award
130.	87/2009	Chamaru Ram Vs HPPWD, Dharampur.	20-05-2010
131.	83/2009	Birender Singh Vs HPPWD, Dharampur.	20-05-2010
132.	276/2009	Bhag Mal Vs HPPWD, Dharampur.	20-05-2010
133.	109/2009	Milap Chand Vs HPPWD, Dharampur.	20-05-2010
134.	648/2008	Manoj Kumar Vs HPPWD, Dharampur.	20-05-2010
135.	133/2007	Yashwant Singh Vs HPPWD, Dharampur.	20-05-2010
136.	44/2007	Sikand Lal I Vs SE, PSEB.	20-05-2010
137.	148/2006	President Bijli Mazdoor Sangh Vs PSEB.	20-05-2010
138.	193/2007	Rajesh Kumar Vs Baloh Co-opt. Society.	22-05-2010
139.	24/2002	Sarita Devi Vs M/S Baijnath Tea Estate	25-05-2010
140.	81/2002	Pardhan, M/S Baijnath Tea Estate Vs M/S Baijnath Tea Estate	25-05-2010
141.	128/2007	Judhya Devi Vs I&PH, Padhar	25-05-2010
142.	85/2005	Chint Ram Vs I&PH, Padhar.	28-05-2010
143.	82/2005	Man Singh Vs I&PH, Padhar.	28-05-2010
144.	22/2006	Mehar Chand Vs HPPWD .	28-05-2010
145.	39/2006	Dina Nath Vs EE HPSEB.	01-06-2010
146.	180/2007	Man Dass Vs HPPWD.	01-06-2010
147.	69/2007	Raghubir Singh Vs MD HRTC.	01-06-2010
148.	214/2003	Pitamber Lal Vs HPSEB.	01-06-2010
149.	8/2007	Virender Kumar Vs HPPWD.	01-06-2010
150.	107/2005	Nagender Kumar Vs HPSEB.	01-06-2010
151.	104/2005	Naresh Kumar Vs HPSEB.	01-06-2010
152.	41/2005	Shambhu Ram Vs I&PH.	01-06-2010
153.	49/2006	Nand Lal Vs I&PH.	01-06-2010
154.	90/2005	Som Nath Vs HPPWD	03-06-2010
155.	70/2005	Raj Kumar Vs DFO.	03-06-2010
156.	92/2006	Gurdas Ram Vs Punjab Laminates.	03-06-2010
157.	178/2000	Rakesh Kumar Vs Ex. Officer Municipal.	04-06-2010
158.	97/2006	Prithi Chand Vs DM Working Division.	04-06-2010
159.	181/2001	Gandhi Ram Vs G.M. Hydro Electric.	11-06-2010
160.	223/2001	Tilak Raj Vs G.M. Hydro Electric.	11-06-2010
161.	234/2001	Desh Raj Vs G.M. Hydro Electric.	11-06-2010
162.	177/2001	Tara Chand Vs G.M. Hydro Electric.	11-06-2010
163.	225/2001	Suneet Singh Vs G.M. Hydro Electric.	11-06-2010
164.	182/2001	Mast Ram Vs G.M. Hydro Electric.	11-06-2010
165.	222/2001	Punnu Ram Vs G.M. Hydro Electric.	11-06-2010
166.	371/2002	Krishan Kumar Vs HRTC.	15-06-2010
167.	56/2002	Prabhakar Singh Vs M/S Poly NIpsa.	16-06-2010
168.	54/2002	Diwakar Singh Vs M/S Poly NIpsa.	16-06-2010
169.	5/1998	Roop Lal Vs HPSEB.	16-06-2010
170.	41/2006	Chunni Lal Vs HPSEB.	19-06-2010
171.	51/2007	Madho Ram Vs I&PH.	19-06-2010
172.	94/2005	Bed Ram Vs HPSEB.	21-06-2010
173.	21/2006	Secretary, Un-skilled Vs M.D. HPMC.	28-06-2010
174.	141/2003	Bhartiya Mazdoor Sangh Vs HPSEB.	28-06-2010
175.	96/2006	Joginder Singh Vs HPFC.	29-06-2010
176.	57/2005	Ail Ram Vs HPPWD.	29-06-2010
177.	56/2005	Karam Chand Vs HPPWD.	29-06-2010
178.	12/2005	Bir Singh Vs HPPWD.	29-06-2010
179.	173/2005	Keshav Ram Vs HPPWD.	29-06-2010
180.	55/2005	Tek Chand Vs HPPWD.	29-06-2010
181.	7/2005	Rikhi Dutt Vs HPSEB.	30-06-2010
182.	47/2005	Daulat Ram Vs HPSEB.	30-06-2010
183.	50/2005	Hukkam Chand Vs HPSEB.	30-06-2010
184.	10/2005	Puran Chand Vs HPSEB.	30-06-2010

By order,
ACS (Labour & Employment).

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 283/2009

Date of Institution : 29.5.2009

Date of decision : 30.4.2010

Shri Abdul Rajjak S/o Shri Salamat Khan, R/o Village Bhadyar, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P. . *Petitioner.*

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P. . *Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Abdul Rajjak S/o Shri Salamat Khan by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE No. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made

should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be

employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest

Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1130/07-349 dated 21.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.’s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent’s allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 57/2005
Date of Institution : 16.3.2005
Date of decision : 29.6.2010

Shri Ail Ram S/o Shri Kahan Singh, R/o Village Dhabehad, P.O. Dhabehad, Distt. Mandi, H.P. . .Petitioner

Versus

The Executive Engineer, HPPWD Division, Udaipur, Distt. Lahaul & Spiti, H.P. . .Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“Whether the termination of services of Shri Ail Ram S/o Shri Kahan Singh, workman by the Executive Engineer, HPPWD Division, Udaipur, District Lahaul & Spiti, H.P. w.e.f. 19.10.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was engaged as a daily waged beldar by the respondent in the year 1994 and continued as such till October, 2002. His services came to be terminated thereupon without any notice and in violation of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). He had completed the requisite 160 days required to be completed in the preceding 12 months of his termination in Lahaul and Spiti.

3. The petitioner had requested the respondent to re-engage him but to no avail. They refused to do so. He raised an industrial disputes which culminated in the present reference. That permanent work was available with the respondent department and the services of the petitioner were terminated in order to defeat the right of the petitioner. Even otherwise juniors to the petitioner have still been retained by the respondent and furthermore fresh persons have been engaged by the respondent after the termination of the petitioner. The action of the respondent was thus also violative of the provisions of Section 25-G and 25-H of the Industrial Disputes Act.

4. The petitioner thus seeks re-engagement from the date of his termination along with all consequential benefits.

5. The respondent while controverting the allegations of the petitioner has averred that they adopt a different system for engaging labour in the tribal areas. The department invites quotations from the labour contractors and on the basis of the same supply order was issued in favour of the contractor for the supply of labour for a particular period on contract basis. The petitioner was also engaged as a contract labourer on different occasions through various labour supply contractors. The petitioner had worked with the department in different capacities in different years through the labour supply order of labour on commission basis for different places in the work season i.e. from May to October. He was engaged as per the award to the contractor in each financial year. The petitioner had been engaged through different labour supply contractors as per labour supply orders annexed along with reply. Since the contract labour is engaged for seasonal work and their services are terminated as per the contract. It does not amount to retrenchment as per the provisions of Section 2(oo) and 25-F of the Act.

6. While filing rejoinder the averments in the reply were denied and those in the statement of claim were reiterated.

7. I notice that on 4.9.2006 the following issues came to be framed by my ld. predecessor:

1. Whether the disengagement of the claimant by the respondent is unlawful or not? . . .OPP
2. Whether the petitioner as contended by the respondent was a contract labour or not if so its effect? . . .OPR
3. Relief.

8. I have heard the ld. counsel/authorized representative for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 : Yes
Issue No.2 : No
Relief. : Allowed as per operative part of the award.

REASONS FOR FINDINGS

ISSUES NO. 1 and 2

9. Both the issues are being clubbed together for discussion as they are co-related and intermingled.

10. The case set up by the petitioner is that his services were disengaged by the respondent in October, 2002. He had worked as a beldar with the respondent since the year 1996 and his services were terminated in October, 2002. On the contrary it is the case of the respondent that the labour is procured by the department on the basis of a supply order from different contractors and the petitioner was also been engaged as a contract labourer on different occasions through various labour supply contractors. In fact there are four other connected references where was a similar stand has been taken by the respondent.

11. On merits it is not denied by the respondent that the petitioner was not working as a beldar since the year 1996 till October, 2002. The respondent has rather placed on record the mandays of the petitioner vide Ex. RA. It shows that the petitioner had been working with the respondent since 1996 till the year 2002. Immediately preceding his termination he had completed 160 days of work with the respondent. Needless to reiterate that in a tribal areas like Lahaul & Spiti which remains snow bound except from May to October, 160 days have been specified to be the number of days required to be counted for a period of one year as "continuous service" envisaged under Section 25-B of the Act.

12. On the contrary the respondent has categorically averred that the work in the tribal area is undertaken by the department through labour contractors on different occasions for the supply of labour for a particular period on contract basis. Subsequently the petitioner was also engaged as contract labour on different occasions by various labour supply contractors. The respondent had also placed on record Annexure A to Annexure E being the supply orders for labour (though not filed along with in this particular case). No doubt the documents (annexed in all other similar matters and perusal from record) show that the department had sought labour on supply from different contractors on different dates and for different locations. However, there is no evidence on record that the petitioner had been engaged in pursuance to the said supply orders issued by the respondent. The Executive Engineer, HPPWD, Udaipur while appearing as RW1 has merely stated that since the work can be undertaken in Lahaul valley only for six months the labour is employed on contract. Every year new tenders are invited and work is allowed to new contractors to supply labour. Apart from this generalized statement there is nothing on record to show that even the petitioner had been employed by any one of the contractors whose labour contracts have been placed on record as Annexure A to Annexure E. The said annexures have merely been annexed along with the reply and there is no corresponding evidence to show that the petitioner had been employed in pursuance to the said contract.

13. It is also the pleaded case of the respondent that the petitioner has been engaged as a contract labour on different occasions by various labour supply contractors. However the mandays chart show that the petitioner had been consistently working with the respondent department from May to October in each year i.e. from 1996 to 2002. The mandays of the petitioner further is suggestive of the fact that he has completed more than 160 days in four years and even in the other three years working days were more than 130. That being so it cannot be said that the petitioner had been appointed against some specific work only.

14. During the course of arguments I had gone through the record and while perusing the same I noticed that the muster rolls of the petitioners one of them being muster roll No.434 pertaining to the period once 1.7.1998 to 31.7.1998 in respect of petitioner Karam Dass was in respect of a work R/o Snow damages of GBKT Road Km 0/0 to 17/0. It is not inferable from the muster roll that the workmen referred therein were supplied by any contractor. The muster rolls have been issued to the Junior Engineer, Koksar. A part of the record referred in the shape of muster rolls (M.R. No.434, 486, 504, 671, 698, 731, 764, 800, 834, 38, 75, 111, 147, 26, 68, 107, 144, 181, 217, 41, 76, 110, 143, 177 and 212 total 25 no.) pertaining to the period from 1.7.1998 to 1.10.2002 had been retained for perusal. Invariably the aforesaid muster rolls have been issued by the department themselves. Thus it cannot be inferred that the petitioner and the other workmen had been working as contract labourers. Had, it been so the muster rolls would have been either issued by the contractor or have not so through the contractor. The payment in respect of muster rolls has been also apparently to the petitioner themselves. Even otherwise there is nothing on record to remotely suggest as to who was the contractor with whom the petitioner had been working. Had the petitioner been working with some contractor certainly the contractor would have got his labour registered with the Labour Inspector, Kullu. The name of the labourers in the shape of a list should have been on record and would have also been supplied as such thereto to the department. It was in fact even required to be done as per the tender. No such document is on record.

15. Not only this from the mandays chart prepared by the respondent themselves the petitioner had been working continuously throughout the working season i.e. May to October. These are the only working days in the Lahaul valley. If that was so it will be inferred that the petitioner was working continuously with the respondent. It is not that the labour had been taken on contract by the department for specific work. Even the muster rolls perused during the course of scanning the record shows that the services of the petitioner and the other workmen was taken on different works undertaken by the department themselves.

16. Though the Annexure-A to Annexure-E placed on record (except in this case) have not been tendered or exhibited by the witness for the respondent, but a bare perusal of the supply order show that a particular strength of

labour was to be maintained by the contractor and the payment of commission charges were to be made to the contractor at the agreed percentage or on the total amount of the muster rolls and the contractor was to sign the muster roll once in a week and so were the daily reports to be signed by the contractor or by his authorized agent daily and full strength of the labour as stipulated was to be supplied to the Assistant Engineer through the contractor. The perusal of the stipulations of the contract show that the entire list of the contract labourers were to be supplied by them. The entire muster rolls were to be signed by the contractor or his authorized representative including daily reports but nothing has been placed on record to remotely connect the petitioner with any of the contractors.

17. It is thus to be inferred that the petitioner was not engaged through a contractor neither he had been engaged against any specific work by the respondent through contractor.

18. Having come to hold that the petitioner was not a part of the contract labour admittedly no notice had been issued to the petitioner as he was stated to be a contract labourer. I am afraid in those circumstances the disengagement of the petitioner will have to be illegal and unlawful. It was in violation of the provisions of section 25-F and as such liable to be set aside and quashed. It is ordered accordingly.

19. The petitioner while appearing as his own witness has failed to discharge the initial onus of proving that he was not gainfully employed after his termination, as such I am constrained not to award any back-wages to the petitioner. However the respondent shall re-engage the petitioner forthwith along with consequential benefits of seniority and continuity in service from the date of illegal termination i.e. October, 2002, though except back-wages.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 29th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 309/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Amar Nath S/o Shri Shanker Dass, R/o Village Roso, P.O. Sodhot, Tehsil Sarkaghat, District Mandi, H.P.
....Petitioner

Vs.

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Amar Nath S/o Shri Shanker Dass by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of

back-wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?"

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 1.5.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . . .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS**ISSUE NO. 1**

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the

meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.5.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only one namely Roshani Devi, who figures at serial no. 652 in the seniority list Ex. RW1/C and is shown to have been engaged on July 4, 1999, was indubitably junior to the petitioner. The said seniority list is indicative of Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the

persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred "*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*" There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held: "It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1710, dated 31.3.07. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated May 6, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 317/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Amar Singh S/o Shri Narayan Ram, R/o Village & P.O. Cholagarh, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Amar Singh S/o Shri Narayan Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on January, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come,

last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
Issue 2 :	No
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on January, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the

rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1167/07-813 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 13, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from

the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 64/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Amar Singh S/o Shri Dila Ram, R/o village Kulahan, P.O. Hayunpad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Amar Singh S/o Shri Dila Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.2.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said

powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS**ISSUE NO. 1**

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (g) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (h) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of

such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.2.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

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25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of

Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 874/2007-9955, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful

retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 201/2009

Date of Institution : 27.2.2009

Date of decision : 20.5.2010

Shri Ashok Kumar S/o Shri Prabh Dayal, R/o Village Chhatraina, P.O. Darwad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Ashok Kumar S/o Shri Prabh Dayal by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of

the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being

heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.* - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(9) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(1) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference in not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID154/06 & 1308/07-334, dated 21.01.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated January 29, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 82/2006
Instituted on : 16.5.2006
Decided on : 28.4.2010.

Shri Bachnu Ram S/o Shri Asha Ram, R/o Village Swana, P.O. Nakrana, Tehsil Naina Deviji, District Bilaspur, H.P.

.....Petitioner

Versus

Divisional Forest Officer, Wild Life Division, Hamirpur, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the termination of services of Shri Bachnu Ram S/o Shri Asha Ram workman by the Divisional Forest Officer, Wild Life Division, Hamirpur, w.e.f. 21.2.2000 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The claim of the petitioner is that he was appointed as daily paid beldar at Shri Naina Deviji Wild Life Range on 1.4.1996 and continued to work as such upto 20.8.2000. His services were dispensed with verbally and without any notice on 21.8.2000.

3. On 3.12.2002 the petitioner had submitted his demand notice for his reinstatement.

4. Further, per the petitioner the respondent had retained the persons junior to him and they still continued to work with the respondent. The names of the juniors have reproduced by the petitioner, as below:

Sl. No.	Name of Worker	Designation	Date of appt.
1.	Sh. Joginder Singh	Beldar	21.4.1996
2.	Sh. Ram Lal	Beldar	21.1.1997
3.	Sh. Rattan Singh	Beldar	20.2.1997
4.	Sh. Sukh Nand	Beldar	22.10.1997
5.	Sh. Chhota Ram	Beldar	21.4.1997
6.	Sh. Pritam Singh	Beldar	15.4.1998
7.	Sh. Hem Raj	Beldar	01.6.1998
8.	Sh. Ram Rattan	Beldar	1.10.1998
9.	Sh. Naranjan Singh	Beldar	1.1.1999
10.	Sh. Mohinder Singh	Beldar	1.1.1999.

5. It is thus the case of the petitioner that the respondent had not maintained any seniority list before effecting the termination of the petitioner and had retained persons junior to him in service, thereby violating the principle of "Last Come First Go" as enunciated in the provisions of Section 25-G of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act).

6. The petitioner has thus challenged his termination being violative of the provisions of Section 25-F, 25-G and 25-H of the Act.

7. While controverting the case of the petitioner the respondent has pleaded that the petitioner had been working in Shri Naina Devi Wild Life Range on daily wage basis intermittently w.e.f. 21.1.1997 to 20.2.2000. The forestry works are seasonal in nature and as such are not carried out throughout the year. The labourers were engaged on the basis of need and the practice still continuous as such. Whenever there is no work the labourers are dis-engaged and are re-engaged strictly on the basis of seniority. The petitioner was stated to have not completed 240 days in each year. The petitioner was further stated to have abandoned his job on 21.2.2000.

8. Per the respondent no juniors to the applicant have been retained. As per the Government policy the petitioner had not completed 240 days in each calendar year and had willfully absented from work therefore his name automatically came at the last, in the seniority list of the daily wagers.

9. While filing rejoinder the contentions raised in the reply were denied and those in the statement of claim were reiterated by the petitioner.

10. On the pleadings of the parties, the following issues had come to be framed by my Id. predecessor:
 1. Whether the dis-engagement from the service of the petitioner by the respondent is proper and justified? .OPR
 2. If the above issue is proved in affirmative to what relief the petitioner is entitled? .OPP
 3. Relief.

11. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS

ISSUES NO.1 AND 2

12. The issues no. 1 and 2 are being taken up for discussion together as they are inter-related.

13. The respondent in order to prove that the dis-engagement of the petitioner was legal has raised the plea that the petitioner had not completed 240 days in any calendar year. He had left the job willfully, on his own w.e.f. 21.2.2000. It is also the case of the respondent that the work was seasonal in nature and the labourers were being employed as per their need. The respondent had been re-engaging workmen strictly as per their seniority as and when required. In the reply filed to the statement of claim it was the pleaded case of the respondent that the petitioner had worked with the respondent w.e.f. 21.1.1997 to 20.2.2000 on daily wages basis intermittently.

14. In order to prove the said averments the respondent examined Shri Surender Kumar Guleria, Divisional Forest Officer (Wild Life) Hamirpur. Per him the petitioner was engaged as a daily rated labourer in the year 1992 and

he continued to work as such uptill 2001. The petitioner was stated to have been employed on various seasonal works. As per the detail of the mandays (year-wise) the petitioner was stated to have worked with the respondent as under:

Year	No. of days
1992	14
1993	0
1994	45
1995	92
1996	192
1997	220
1998	51
1999	322
2000	90
2001	81

15. Further per the Divisional Forest Officer the petitioner used to remain absent frequently. The respondent's witness also placed on record the mandyas chart in respect of the petitioner as Ex. RW1/B.

16. On the other hand the petitioner while appearing as PW1 has deposed that his services were dispensed with on 21.8.2000 without any notice. The juniors mentioned in para no.6 of the statement of claim who were junior to him had been retained by the respondent and he also annexed the seniority list Annexure-1 along with his affidavit in evidence.

17. The perusal of the evidence on record shows that the petitioner in fact had been working with the department since 1992. As is evident from the Ex. RW1/B and the testimony of the Divisional Forest Officer who has appeared as RW1. It is thus clear that the petitioner was working with the respondent since 1992. The plea of the respondent that the petitioner had been employed only for seasonal work is belied by the testimony of RW1 and Annexure-1 appended along with reply of the respondent which show that the workmen employed and reflected in the seniority list which also includes the name of the petitioner had been working for more than 240 days every year. The same seniority list has been placed on record by the petitioner as Ex. PW1/B. The plea of the respondent that the petitioner had been employed for seasonal work is thus fallacious. It cannot be believed. The plea of abandonment though having been taken in the reply has not been even referred to by the DFO who has appeared as RW1. There is no whisper in his testimony to remotely show that the petitioner had abandoned the job. The witness has only reiterated that he was frequently absenting himself from the work. If that was so his services could have been terminated in accordance with law, but such is not the case in hand. There is no evidence on record to show that the petitioner had willfully absented and thereafter the respondent had issued him a notice that he had ceased to work and as such his services were being terminated.

18. Though the respondent has denied that the juniors to the petitioner have been retained but seniority list on record, which has been placed both by the petitioner and the respondent clearly show that the workmen mentioned in para no.6 of the statement of claim were junior to the petitioner. Even if the date of appointment of the petitioner is taken to be 21.1.1997 as pleaded by the respondent. Sukh Nand, Chhota Ram, Naranjan Singh, Hem Raj and Ram Rattan had been appointed after the petitioner. In fact if the deposition of RW1 is taken into consideration the petitioner had been working with the respondent since 1992. As such he was indeed senior to all the workmen mentioned in para no.6 including Joginder Singh, Ram Lal and Rattan Singh.

19. One thing is thus certain that the petitioner was senior to the other workmen and in the seniority list his name was to be reflected as such, even if he had not completed 240 days in the calendar year preceding his termination bringing him within the category of retrenched workmen covered by the provisions of Section 25-F. The respondent was however duty bound to follow the mandate of the provisions of Section 25-G, which ordains that ordinarily the employer shall retrench the workman who was the last person to the employed in that category.

20. The respondent has not followed the statutory mandate of the provisions of Section 25-G of the Act. Even if the petitioner had not completed 240 days the principle of "last come first go" envisaged under Section 25-G of the Act had to be followed by the respondent. The applicability of the said principle is not confined only to workmen who were in continuous service, but all retrenched workmen, whether or not he has completed 240 days in a calendar year preceding his termination, or not.

21. Thus it is apparent that the termination of the petitioner is not sustainable in the eyes of law being violative of the statutory provisions of Section 25-G. On this ground alone his termination is liable to be set aside and quashed. Both the issues are decided accordingly.

22. The petitioner has deposed in his affidavit by way of evidence that he remained unemployed during the said interregnum and he could not find any job thereafter. Neither as the petitioner been cross-examined in this behalf nor is there any rebuttal on behalf of the respondent to show that the petitioner was gainfully employed during his forced idleness. The petitioner is thus entitled to 50% back-wages as being drawn by the petitioner at the time of his termination.

RELIEF

23. For the foregoing reasons discussed hereinabove, the termination of the petitioner is held to be violative of the provisions of Section 25-G of the Industrial Disputes Act. The same is set aside and quashed. The respondent is directed to re-engage the petitioner as a daily waged beldar within period of 90 days. He shall be entitled to 50% back-wages as being drawn by the petitioner at the time of his termination i.e. 21.2.2000. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 28th day of April 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 330/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Balak Ram S/o Shri Damoder Dass, R/o Village Tourgahri, P.O. Cholagarh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Balak Ram S/o Shri Damodar Dass by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 18.6.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 : No.

Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing

indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 18.6.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1181/07-811 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of

reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 330/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Balak Ram S/o Shri Damoder Dass, R/o Village Tourgahri, P.O. Cholagarh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Balak Ram S/o Shri Damodar Dass by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 18.6.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of

the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or (xiv) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant

factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 18.6.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my

notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1181/07-811 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 46/2009

Date of Institution : 26.2.2009

Date of decision : 20.5.2010

Shri Balbir Singh S/o Shri Narain Singh, R/o Village Chhatraina, P.O. Darwad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Balbir Singh S/o Shri Narain Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being stopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . . OPP
2. Whether the petition is not maintainable, as alleged. . . . OPR
3. Whether the petition suffers from the vice of delay and laches. . . . OPR
4. Whether the petitioner is guilty of suppressio veri. . . . OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . . OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per

working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an “industrial establishment” within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 969/2007-9998 dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-

wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 36/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Smt. Barfi Devi W/o Shri Sheru Ram, R/o Village Saraskana, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Barfi Devi W/o Shri Sheru Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being

heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-(i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 879/2007-9969, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 94/2005

Date of Institution : 18-6-2005

Date of decision : 21-6-2010

Sh. Bed Ram s/o Sh. Bal Dass, Village Mathyyana, P.O. Chanaun, Tehsil Banjar, Distt. Kullu, H.P.

....Petitioner

Versus

The Executive Engineer, HPSEB(E) Sub-Division, Kullu, District Kullu, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, adv.

For the Respondent : Sh. J.S. Chauhan, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Sh. Bed Ram s/o Sh. Bal Dass workman by the Executive Engineer, HPSEB (Electrical) Division, Kullu, Distt. Kullu, H.P. w.e.f.26-11-1999 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, to what relief of consequential service benefits including re-instatement, seniority, backwages and amount compensation the above aggrieved workman is entitled?”

2. The case set up by the petitioner in the statement of claim is short and simple. Per him he was engaged by the respondent on 1-10-1981 and his services were terminated without any notice on 26-11-1999. The same was violative of the provisions of the section 25-F of the Industrial Disputes Act (hereinafter to be referred as the Act).

3. The respondent was stated to have retained persons juniors to the petitioner while terminating his service. To name of few Tirath Ram, Hem Raj, Anil Sharma, Hans Raj, Jagdish Kumar and Bhinder Singh were all stated to be junior to the petitioner.

4. It is further the case of the petitioner that some juniors to the petitioner namely Punne Ram, Gian Chand, Tappe Ram & others have since been regularized by the respondent, though they were engaged only in the year 1991.

5. While contesting the reference the respondent raised preliminary objection vis-à-vis maintainability and the claim being barred by limitation, estoppel and the claim being bad for non-joinder of the necessary parties.

6. On merit it is not denied the petitioner was engaged w.e.f. 1-10-1981. However, as per the respondent the petitioner used to frequently remain absent and as such had not completed 240 days in any year. More over he left the job of his own on 26-11-1999. Per the respondent the petitioner was never terminated and as such resorting to the provisions of the Act was not required. The respondent thus sought dismissal of the claim.

7. While filing the rejoinder the petitioner denied the averments in the reply and reiterated those in the statement of claim.

8. Based on the aforesaid pleadings my Ld. Predecessor had framed the following issues for determination on 10-9-2007:

1. Whether the disengagement from the service of the claimant is proper and justified.

....OPR.

2. If the above issue is in affirmative to what relief of service benefit the petitioner is entitled to?

....OPP.

3. Whether the provision of Sec. 25-G came to be adhered by the respondent at the time of his disengagement of the claimant.

. .OPP

4. Whether the claim petition is stale and time barred.

. .OPR

5. Relief.

9. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1	No
Issue No.2	Yes as per the operative part of the award.
Issue No.3	No
Issue No.4	No
Issue No.5	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS**ISSUE No. 1, 2 & 3.**

10. All the three issues being co-related and intermingled are taken together for decision:

11. In order to countenance the averments of the petitioner the respondents have alleged that the petitioner had abandoned his job w.e.f. 26-11-1999. As per the mandays on record (Ex. RW-1/x), which is not apparently disputed by the petitioner, the petitioner had not completed 240 days in the preceding 12 months of his termination. The question of the violation of section 25-F may thus not arise in the facts and circumstances of the present case.

12. However, since the respondents had taken a specific stand that the petitioner that abandoned job and the said fact has not been duly proved on record, except a bald statement of the Assistant Engineer who has appeared as RW1, to contend that the petitioner had abandoned the job. As it emerges from the deposition of RW1 the Assistant Engineer, no show cause was issued to the petitioner regarding the said abandonment. There is in fact no documentary evidence on record that the petitioner had abandoned the job on the said date.

13. The said fact gains significance because as per the petitioner junior to him had been retained by the respondent, which in itself was violative of the provisions of Section 25-G of the Act. It is by now well settled that the principle of 'Last Come First Go' contained in section 25-G is not only confined to workman who were in "continuous service" as required under section 25-B of the Act. That being so even if the petitioner had not completed 240 days in a calendar year preceding his termination, no doubt the provisions of Section 25-F were not applicable but the provisions of Section 25-G would have been squarely applicable in the fact and circumstances of the case. The petitioner categorically alleged that the junior had been retained by the respondent while showing him the door. The seniority list placed on record by the petitioner by way of additional evidence Ex.PA does show that persons juniors to the petitioner were retained by the respondent. The petitioner as per the respondent had been engaged on 1-10-1981. There are innumerable persons who have been appointed subsequently. So much so, one of the workman had been appointed in the year 1997. Karam Dass, Punne Ram and Tappe Ram were juniors to the petitioner.

14. The respondent having failed to prove that the petitioner had abandoned the job, as a nature corollary, is has to be held that his service were disengaged. It is not denied that no notice had been served on the petitioner as per the requirement of the Act. Thus, as per law the last person to have joined the respondent was to be thrown out first. Apparently it was not done by the respondent. The termination of the petitioner thus has to be held illegal and against the statutory provision of Section 25-G.

15. For all the reason discussed above the termination of the petitioner is held to be bad in the eyes of law. The petitioner had never abandoned the job. Rather, he was unlawfully disengaged against the statutory provisions of the Act.

16. Since the petitioner had failed to discharge the initially onus that he was not gainfully employed during the said period. I do not deem it fit and appropriate to award backwages to the petitioner in the facts and circumstances discussed above.

17. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 4.

18. No doubt the petitioner was terminated on 26-11-1999 and the failure report was submitted by the conciliation officer on 20-11-2003. There is no evidence as to how the claim was stale. There is nothing on record to suggest that the demand notice was stale. Moreover the provision of the Limitation Act do not strictly apply to the Industrial Disputes Act. The matter having become stale has not been proved by the respondent, the onus of which was on them. The issue is accordingly decided against the respondent.

RELIEF

20. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 26-11-1999 is set aside and quashed. He is directed to be reengaged forth with, along with consequential benefits relating to seniority and continuity of service from the date of his termination, except back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 21st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 296/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Beli Ram S/o Shri Safru Ram, R/o Village Chaswal, P.O. Sajayo Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Beli Ram S/o Shri Safru Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on May, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act

were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of

the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable

opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on May, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is

held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1283/07-283 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from

today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 276/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Bhag Mal S/o Shri Moti Ram, R/o Village & P.O. Tour Khola, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Bhag Mal S/o Shri Moti Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 3.6.2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act. 7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an “industrial establishment” within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon’ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon’ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon’ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1160/07-802, dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 25, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.’s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent’s allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. :141/2003
Date of Institution : 25-4-2003
Date of decision : 28.6.2010

President Bhartiya Mazdoor Sangh, H/Q Balakrupi, P.O Jalpehar, Teh. Joginder Nagar, Distt. Mandi (H.P.)

....Petitioner

Versus

1. The Superintending Engineer, HPSEB, Circle Mandi H.P.
2. The Additional Superintending Engineer, HPSEB, Electrical Division Joginder Nagar, Distt. Mandi.

H.P.

....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, A.R.
For the Respondent : Sh. J.S. Chauhan, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“क्या नियोक्ता अधीक्षण अभियन्ता, हि0प्र0 रा0 विद्युत वृत्त मण्डी, हि0प्र0 तथा (2) अतिरिक्त अधीक्षण अभियन्ता, हि0प्र0 विद्युत मण्डल, जोगिन्दरनगर, जिला मण्डी, हि0प्र0 द्वारा श्री काली दास से कनिष्ठ कामगारों को दिनांक 18.3.89 से टी-मेट नियमित करने की कार्यवाही उचित है, यदि नहीं तो श्री काली दास किस तिथि से नियमित होने व किस पूर्व वेतन, वरिष्ठता, सेवा लाभों व राहत का पात्र है।”

2. In pursuance to the reference the statement of claim to be filed through the union alleging that Sh. Kali Dass came to be engaged by the Board on daily waged basis on 25-1-1979 in Electrical Sub Division Joginder Nagar as a beldar. He continued working as such in the same capacity. As on 24-5-1994 the said workman had completed 240 days in all the years and as such had completed “continuous service” as envisaged under Clause 5 of the standing orders of the Board. A casual workman who had completed 240 days of uninterrupted services for 5 years was entitled to 10% additional marks as the time of regular selection as work charge against a regular post.

3. The Board on 14-4-1984 and 16-4-1984 held the interviews for regularization as work charge T-Mate in the pay scale Rs. 300-450. The said workman Kali Dass along with the other namely S/Sh. Karam Singh, Raghubir

Singh, Devi Dass, Shankar, Madho Ram, were also considered. The service of all workmen mentioned herein above except Kali Dass was regularized.

4. Per the petitioner the other workmen mentioned above were junior to Kali Dass. The board again held interview on 18-3-1989. Kali Dass again appeared before the interview committee along with his juniors. Again the services of all, except the Kali Dass was regularized. Further per the statement of claim the Secretary of the board had vide letter dated 22-1-1992 directed the appointment of all dailywaged workman on regular basis as T-Mate. All the dailywaged workmen were ordered to be regularized before 1st Feb., 1992. The services of 20 workmen were regularized by the board except Kali Dass. Per the applicant all workman whose services have been regularized by the board prior to 1st Feb., 1992 were juniors to Kali Dass. The board had eventually regularized Kali Dass w.e.f. 25-5-1994.

5. It is thus prayed that Kali Dass be directed to be regularized w.e.f. 1984 or 18-3-1989 as a regular T-Mate along with all consequential benefits including revised pay scale.

6. While contesting the claim the respondent inter-alia raised the number of preliminary objection vis-à-vis maintainability, limitation, estoppels and non-joinder of necessary party.

7. On merit it is not denied that Kali Dass has not worked as a beldar with the respondent w.e.f. 25-1-1997 till 27-5-1994.

8. It is also not denied that he appeared before the interview for the post of regular T.Mate in the year 1984. However the said Kali Dass is stated to have not obtained the position as per merit in comparison to other candidates. As the promotions were carried out as per the open interview conducted by the board and the candidates were selected as per their respective merits. The applicant Kali Dass used to remain absent from duty and had not worked with the board for 4 months w.e.f. 25-1-1979 to 1-7-1980. His seniority as such had been deemed from 2-7-1980. Even in the interviews held in the year 1989 Kali Dass did not fair better than other candidates on merit. Finally Kali Dass was regularized w.e.f. 27-5-1994 as per the seniority. The said Kali Dass had also filed a O.A. bearing No. 283/96 in the Administrative Tribunal Shimla, after his regularization. That the same was dismissed vide an order dated 19-12-1996, being time barred.

9. Further per the respondent approval for regularization of 21 dailywagers beldars were received from the board but out of these 21 beldars the offer of regular appointment as T-Mate were only given to 9, who were senior most as per Divisional seniority list maintained by the respondent. Other 12 beldars including Kali Dass were not regularized has their names had been inadvertently approved for regularization. It is thus prayed that the claim be dismissed.

10. While filing the rejoinder the averments in the reply were controverted and those in the claim were reiterated.

11. I notice that on 6-4-2004 the following issues came to be framed by my Ld. Predecessor:

1. Whether the regularization of the persons junior to the petitioner w.e.f. 18-3-1989 as T.Mate by the respondents is justified & legal?

....OPP.

2. If issue No.1 is not proved from which date the petitioner is entitled to be regularized with consequential service benefits?

.....OPP

3. Whether the petition is not maintainable as alleged.

. .OPR.

4. Whether the present petition is barred by time, as alleged.

. .OPR

5. Whether the petitioner is estopped to file and maintain the present petition in view of preliminary objection.

...OPR.

6. Whether the petition is bad for mis-joinder & non-joinder of necessary parties, as alleged.

.... OPR.

7. Relief.

12. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus;

Issue No. 1 No

Issue No.2	No
Issue No.3	Yes
Issue No.4	Yes
Issue No.5	Yes
Issue No. 6	No
Issue No.7	Claim petition dismissed.

REASONS FOR FINDINGS

Issues No. 3, 4 & 5

13. All the three issues have been taken up together as they are co-related and inter mingled. Since the three issues are legal and have a bearing on the merits of the case, they are being taken up for discussion first.

14. The respondent had raised a plea that the petition is not maintainable as the application is hit by res-judicata since the petitioner has approached the Administrative Tribunal by filing an O.A. bearing No. 283/96 seeking the regularization from the date of his first interview held on 18-4-1985, which has comes to be dismissed as 19-4-1996. Besides that the union has filed the present statement of claim after Kali Dass has been regularized w.e.f. 27-4-1994 i.e. after 12 years of his non-selection in the year 1984.

15. Kali Dass while appearing as PW1 has not denied having moved the Administrative Tribunal and the final order having been passed on 19-12-1996 vide Ex. RA.

16. The perusal of the order dated 19th December, 1996 (Ex.RA) passed by the Hon'ble Administrative Tribunal shows that since he had sought seniority after his regularization in the year 1994, his act of approaching the Tribunal was beyond the period of limitation envisaged under the Administrative Tribunal Act. It came to be dismissed on the grounds of the limitation.

17. What emerges from the pleadings and evidence on record is that Kali Dass was considered for regularization as T-Mate in the year 1984 and in the subsequent interview held in the year 1989 which were on the basis of inter-se, merit all the candidates. Apparently he was not selected in both the interviews and eventually came to be regularized on 27-5-1994 strictly on the basis of seniority. It is admitted by Kali Dass while appearing as RW1 that he had submitted representation against his non-selection in the year 1985-89 and 1992 however he has not placed them on record nor he is in a position to place them on record. It is thus apparent that the petitioner himself has lost the right and the remedy because of the long delay in approaching the Court. Even assuming there was some discrepancies in the selection process the petitioner could have approached the competent forum immediately thereupon. His interview took place in the year 1984. The petitioner did not raise any objection at that time. Subsequently another interview was held in the year 1989. Still he did not raise any objection. In the year 1992 the Secretary of the board ordered the regularization of some workmen. The petitioner Kali Dass was not regularized. It may have been wrong. Even despite that the Kali Dass did not raise any protest. It is only after he was regularized on 27-5-1994 as per his seniority, the petitioner approached the Hon'ble Administrative Tribunal. That was also two years after his regularization. The cause in any case before the Administrative Tribunal was also vis-à-vis seniority and promotion. No doubt the application was dismissed on the ground of limitation but it would certainly operate as constructive res-judicata. Coupled with the long delay in approaching the Court the claim of the petitioner Kali Dass has become stale and has lost its sheen. Kali Dass got a number of opportunities to assail the wrong doings of the board, but for the reasons best known to him he did not bother to impugn their misdeed. It is by now well settled that law helps the vigilant. The workmen kept sleeping for decades without taken recourse to law. Today even law cannot help him.

18. The claim set out by the petitioner has thus to be held to be stale and hit by vice of res-judicata and the petitioner is estopped from raising the same and that too, after having got it dismissed on the same cause by the Hon'ble Administrative Tribunal. All the three issues thus are accordingly decided in favour of the respondent and against the petitioner.

ISSUES NO. 1 & 2

19. For the reasons discussed above the two issues literally become redundant. Nonetheless perusal of the records shows that the selection process was envisaged him. In pursuance to the open interview on the basis of merit-cum-seniority for regularization of T-Made is such interview were held by the respondent from 14-4-1984 to 16-4-1984 and subsequently in the year 1989. The respondent has placed on record the record pertains to interview vide annexure RW1/B to RW1/D. The said Kali Dass had been duly considered in both the interviews is having not been selected. The said workman should have impeached the action of the respondent immediately thereupon. No steps were taken by the workman after both the interviews. Since the process was based on marks-cum-seniority it cannot be said that the

respondent had regularized person juniors to the petitioner. It is one of the rare case whether the petitioner has himself controverted his claim in the stale claim. He did not raise any protest at the relevant time. It is only after he was regularized strictly on the basis of seniority w.e.f. 27-5-1994 that the petitioner started raising false with the selection process initiated more than decade ago by the respondent it cannot be entertained that the belated steps as such. Consequently, both the issues decided against the petitioner.

Issue No. 6

20. Nothing has been urged and brought to my notice how the petition is bad for non-joinder or mis-joinder of the necessary parties. The issue is accordingly decided against the respondent and in favour of the petitioner.

RELIEF

21. For all the foregoing reasons discussed the reference fails and is accordingly dismissed. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 28th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 217/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Bhola Shankar S/o Shri Gursai, R/o Village Kumharada, P.O. Pehad, Tehsil Sarkaghat, District Mandi,
H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Bhola Shankar S/o Shri Gursai, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 11.7.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (i) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing

indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 11.7.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in his affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to his, were still working with the respondent. Of these workmen, however, only two namely Shashi Lal and Roshani Devi, who figure at serial nos. 646 and 652 in the seniority list Ex. PW1/B and are shown to have been engaged on April 6, 1999 and July 4, 1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of these workmen having been retained in service at the time the petitioner was retrenched. It may also be noticed that the respondent's witness Sh. Naresh Kumar Sharma, Executive Engineer, HP.PWD Dharampur, admitted in no ambiguous words the petitioner's suggestion in his cross-examination as RW1 "that Smt. Roshani Devi w/o Nag Ram and Shashi Kant S/o Bihari Lal, whose names figure at serial nos. 652 and 646 respectively in the seniority list Ex. PW1/B, were engaged as daily wagers on 4.7.1999 and 6.4.1999 respectively and are still working with the department." In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at

serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred "*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*" There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 645/07-2120, dated 18.6.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated May 13, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 279/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Bhoop Singh S/o Shri Ram Singh, R/o Village & P.O. Tour Khola, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Bhoop Singh S/o Shri Ram Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on Janjaury, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come,

last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on January, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of

Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1182/07, dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-

wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 12/2005

Date of Institution : 31.12.2004

Date of decision : 29.6.2010

Shri Bir Singh S/o Shri Basakhu Ram, R/o Village Kharidhar (Thata) P.O. Ghaniyar, Sub Tehsil Balichowki, Distt. Lahaul & Spiti, H.P.

....Petitioner

Versus

1. The Executive Engineer, HPPWD Division, Udaipur, Distt. Lahaul & Spiti, H.P.
2. Assistant Engineer, HPPWD, Sub Division Koksar, Distt. Lahaul & Spiti H.P.

....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“क्या श्री बीर सिंह सपुत्र श्री बसाखू राम, गांव खड़ीधार (थाटा) डाकखाना घनियार उप-तहसील बाली चौकी जिला मण्डी (हिमाचल प्रदेश) की सेवाएं (1) अधिशाषी हि० प्रदेश लोक निर्माण विभाग उदयपुर, जिला लाहौल स्पिति और (2) हि० प्रदेश सहायक अभियन्ता हि० प्रदेश लोक निर्माण विभाग उप मण्डल कोकसर, जिला लाहौल स्पिति, हि० प्रदेश द्वारा बिना कारण, आरोप-पत्र, नोटिस के छंटनी मुआवजा के भुगतान किये बिना माह अक्तूबर, 2002 से समाप्त करना वैध है अथवा अवैध, यदि अवैध है तो कामगार श्री बीर सिंह सपुत्र श्री बसाखू राम किस राहत व क्षतिपूर्ति का हकदार/पात्र है।”

2. The case set up by the petitioner in the statement of claim is that he was engaged as a daily waged beldar by the respondent in the year 1994 and continued as such till October, 2002. His services came to be terminated thereupon without any notice and in violation of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). He had completed the requisite 160 days required to be completed in the preceding 12 months of his termination in Lahaul and Spiti.

3. The petitioner has requested the respondent to re-engage him but to no avail. They refused to do so. He raised an industrial disputes which culminated in the present reference. That permanent work was available with the respondent department and the services of the petitioner were terminated in order to defeat the right of the petitioner. Even otherwise juniors to the petitioner have still been retained by the respondent and furthermore fresh persons have been engaged by the respondent after the termination of the petitioner. The action of the respondent was thus also violative of the provisions of Section 25-G and 25-H of the Industrial Disputes Act.

4. The petitioner thus seeks re-engagement from the date of his termination along with all consequential benefits.

5. The respondent while controverting the allegations of the petitioner has averred that they adopt a different system for engaging labour in the tribal areas. The department invites quotations from the labour contractors and on the basis of the same supply order was issued in favour of the contractor for the supply of labour for a particular

period on contract basis. The petitioner was also engaged as a contract labourer on different occasions through various labour supply contractors. The petitioner had worked with the department in different capacities in different years through the labour supply order of labour on commission basis for different places in the work season i.e. from May to October. He was engaged as per the award to the contractor in each financial year. The petitioner had been engaged through different labour supply contractors as per labour supply orders annexed along with reply. Since the contract labour is engaged for seasonal work and their services are terminated as per the contract. It does not amount to retrenchment as per the provisions of Section 2(oo) and 25-F of the Act.

6. While filing rejoinder the averments in the reply were denied and those in the statement of claim were reiterated.

7. I notice that on 15.7.2006 the following issues came to be framed by my Id. predecessor:

1. Whether disengagement from the service of the claimant is in accordance with law?

. .OPP

2. If the above issue is proved in affirmative to what relief to the claimant is entitled.

.... OPP

3. Whether the claimant abandoned his job.

. .OPR

4. Relief.

8. I have heard the Id. counsel/authorized representative for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 : No

Issue No.2 : As per operative part of Judgment.

Issue No.3 : No

Issue No.4 : Allowed as per the award.

REASONS FOR FINDINGS

ISSUES NO. 1, 2 and 3

9. All the three issues are being clubbed together for discussion as they are co-related and intermingled.

10. The case set up by the petitioner is that his services were disengaged by the respondent in October, 2002. He had worked as a beldar with the respondent since the year 1994 and his services were terminated in October, 2002. On the contrary it is the case of the respondent that the labour is procured by the department on the basis of a supply order from different contractors and the petitioner was also been engaged as a contract labourer on different occasions through various labour supply contractors. In fact there are four other connected references where a similar stand has been taken by the respondent.

11. On merits it is not denied by the respondent that the petitioner was not working as a beldar since the year 1994 till October, 2002. The respondent has rather placed on record the mandays of the petitioner vide Ex. RA. It shows that the petitioner had been working with the respondent since 1994 till the year 2002. Immediately preceding his termination he had completed 160 days of work with the respondent. Needless to reiterate that in a tribal areas like Lahaul & Spiti which remains snow bound except from May to October, 160 days have been specified to be the number of days required to be counted for a period of one year as "continuous service" envisaged under Section 25-B of the Act.

12. On the contrary the respondent has categorically averred that the work in the tribal area is undertaken by the department through labour contractors on different occasions for the supply of labour for a particular period on contract basis. Subsequently the petitioner was also engaged as contract labour on different occasions by various labour supply contractors. The respondent had also placed on record Annexure A to Annexure D being the supply orders for labour. No doubt the documents show that the department had sought labour on supply from different contractors on different dates and for different locations. However, there is no evidence on record that the petitioner had been engaged in pursuance to the said supply orders issued by the respondent. The Executive Engineer, HPPWD, Udaipur while appearing as RW1 has merely stated that since the work can be undertaken in Lahaul valley only for six months the labour is employed on contract. Every year new tenders are invited and work is allowed to new contractors to supply labour. Apart from this generalized statement there is nothing on record to show that even the petitioner had been employed by any one of the contractors whose labour contracts have been placed on record as Annexure A to

Annexure D. The said annexures have merely been annexed along with the reply and there is no corresponding evidence to show that the petitioner had been employed in pursuance to the said contract.

13. It is also pleaded case of the respondent that the petitioner has been engaged as a contract labour on different occasions by various labour supply contractors. However the mandays chart show that the petitioner had been consistently working with the respondent department from May to October in each year i.e. from 1994 to 2002. The mandays of the petitioner further is suggestive of the fact that he has completed more than 160 days in four years and even in the other three years working days were more than 130. That being so it cannot be said that the petitioner had been appointed against some specific work only.

14. During the course of arguments I had gone through the record and while perusing the same I noticed that the muster rolls of the petitioners one of them being muster roll No.434 pertaining to the period once 1.7.1998 to 31.7.1998 in respect of petitioner Karam Dass was in respect of a work R/o Snow damages of GBKT Road Km 0/0 to 17/0. It is not inferable from the muster roll that the workmen referred therein were supplied by any contractor. The muster rolls have been issued to the Junior Engineer, Koksar. A part of the record referred in the shape of muster rolls (M.R. No.434, 486, 504, 671, 698, 731, 764, 800, 834, 38, 75, 111, 147, 26, 68, 107, 144, 181, 217, 41, 76, 110, 143, 177 and 212 total 25 no.) pertaining to the period from 1.7.1998 to 1.10.2002 had been retained for perusal. In variably the aforesaid muster rolls have been issued by the department themselves. Thus it cannot be inferred that the petitioner and the other workmen had been working as contract labourers. Had, it been so the muster rolls would have been either issued by the contractor or have not so through the contractor. The payment in respect of muster rolls has been also apparently to the petitioner themselves. Even otherwise there is nothing on record to remotely suggest as to who was the contractor with whom the petitioner had been working. Had the petitioner been working with some contractor certainly the contractor would have got his labour registered with the Labour Inspector, Kullu. The name of the labourers in the shape of a list should have been on record and would have also been supplied as such thereto to the department. It was in fact even required to be done as per the tender. No such document is on record.

15. Not only this from the mandays chart prepared by the respondent themselves the petitioner had been working continuously throughout the working season i.e. May to October. These are the only working days in the Lahaul valley. If that was so it will be inferred that the petitioner was working continuously with the respondent. It is not that labour had been taken on contract by the department for specific work. Even the muster rolls perused during the course of scanning the record shows that the services of the petitioner and the other workmen was taken on different works undertaken by the department themselves.

16. Though the Annexure-A to Annexure-D placed on record have not been tendered or exhibited by the witness for the respondent, but a bare perusal of the supply order show that a particular strength of labour was to be maintained by the contractor and the payment of commission charges were to be made to the contractor at the agreed percentage or on the total amount of the muster rolls and the contractor was to sign the muster roll once in a week and so were the daily reports to be signed by the contractor or by his authorized agent daily and full strength of the labour as stipulated was to be supplied to the Assistant Engineer through the contractor. The perusal of the stipulations of the contract show that the entire list of the contract labourers were to be supplied by them. The entire muster rolls were to be signed by the contractor or his authorized representative including daily reports but nothing has been placed on record to remotely connect the petitioner with any of the contractors.

17. It is thus to be inferred that the petitioner was not engaged through a contractor neither he had been engaged against any specific work by the respondent through contractor.

18. Having come to hold that the petitioner was not a part of the contract labour admittedly no notice had been issued to the petitioner as he was stated to be a contract labourer. I am afraid in those circumstances the disengagement of the petitioner will have to be illegal and unlawful. It was in violation of the provisions of section 25-F and as such liable to be set aside and quashed. It is ordered accordingly.

19. The petitioner while appearing as his own witness has failed to discharge the initial onus of proving that he was not gainfully employed after his termination, as such I am constrained not to award any back-wages to the petitioner. However the respondent shall re-engage the petitioner forthwith along with consequential benefits of seniority and continuity in service from the date of illegal termination i.e. October, 2002, though except back-wages.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 29th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 83/2009

Date of Institution : 26.2.2009

Date of decision : 20.5.2010

Shri Birender Singh S/o Shri Balam, R/o Village Parsda Hawani, P.O. Ropari, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Birender Singh S/o Shri Balam, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . . OPP
2. Whether the petition is not maintainable, as alleged. . . . OPR
3. Whether the petition suffers from the vice of delay and laches. . . . OPR
4. Whether the petitioner is guilty of suppressio veri. . . . OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . . OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1003/2007-10035, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 415/2008
Instituted on : 13.6.2008
Decided on : 1.5.2010

Smt. Bohari Devi W/o Shri Sukh Ram, R/o Village Jandiyar, P.O. Kangoo Gehra, Tehsil Sarkaghat, District Mandi, H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Smt. Bohari Devi W/o Shri Sukh Ram, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 24.6.1999 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus,

to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
2. Whether the petition is not maintainable, as alleged. .OPR
3. Whether the petition suffers from the vice of delay and laches. .OPR
4. Whether the petitioner is guilty of suppressio veri. .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-(o) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 24.6.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o

Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only one namely Roshani Devi, who figures at serial no. 652 in the seniority list Ex. RW1/C and is shown to have been engaged on July 4, 1999, was indubitably junior to the petitioner. The said seniority list is indicative of Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred "*that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members....*" There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman

merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/45/2005 & 622/07-1760, dated 4.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated April 5, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 362/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Smt. Brahmi Devi W/o Shri Bhagmal, R/o Village Dhelu Tanher, P.O. Tanher, Tehsil Sarkaghat, District Mandi, H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
 For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:
“Whether retrenchment of services of Smt. Brahmi Devi W/o Shri Bhagmal by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”
2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 1.1.1999 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.
3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.
4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.
5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.
6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.
7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.
8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.
9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.
10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.
11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
 2. Whether the petition is not maintainable, as alleged. . .OPR
 3. Whether the petition suffers from the vice of delay and laches. . .OPR
 4. Whether the petitioner is guilty of suppressio veri. . .OPR
 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
 6. Relief.
12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-
- Issue 1 : Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-

H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred "*that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members....*" There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1843 dated 11.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 242/2008
Date of Institution : 13.6.2008
Date of decision : 20.5.2010

Shri Brij Lal S/o Shri Paras Ram, R/o Village Didnu, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Brij Lal S/o Shri Paras Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 10.2.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.

Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of

such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 10.2.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 639/07-2090, dated 17.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated May 19, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful

retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 195/2007
Date of Institution : 27.11.2007
Date of decision : 27.4.2010

Shri Chaman Lal S/o Shri Jodha Singh, R/o Village & P.O. Auhor, Tehsil Ghumarwin, District Bilaspur, H.P.
....Petitioner

Versus

The Deputy Director of Agriculture, Bilaspur, District Bilaspur, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

The appropriate government has sought a determination on the following point of Reference:

“Whether the termination of services of Shri Chaman Lal S/o Shri Jodha Singh workman by the Dy. Director of Agriculture, Bilaspur, District Bilaspur, H.P. w.e.f. December, 2002 without complying the provisions of the Industrial Disputes Act, 1947 whereas junior to him were retained by the employer is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case of the petitioner as it emerges from the statement of claim is that he was appointed as a daily waged beldar (workman) on 1.10.1983 and he continued to work as such till 18.12.2002. As per the petitioner his name was reflected at serial no.3 of the seniority list, however the respondent had wrongly reflected the name of Smt. Meera Devi in his place. The said act of the respondent itself was reflecting of unfair labour practice.

3. Further per the petitioner his services had been dis-engaged by the respondent verbally and without any notice on 19.12.2002. He had challenged his termination vide O.A. No.3021/2002 before the Hon'ble Administrative Tribunal on 14.12.2002 but the same was dismissed for want of jurisdiction.

4. The persons junior to him who have still been retained by the respondent have been named thus:

Sl. No.	Name of Worker	Father's name	Appt. Year
1.	Sh. Budhi Singh	Sh. Sukh Ram	1984
2.	Sh. Shyam Lal	Sh. Mahantu Ram	1989
3.	Rattan Lal	Sh. Sita Ram	1989
4.	Smt. Meera Devi W/o	Sh. Ram Prakash	1991
5.	Sh. Rajan Kumar	Sh. Roshan Lal	1992
6.	Sh. Tarsem Singh	Sh. Munshi Ram	1993
7.	Sh. Bhagwant Kishore	Sh. Roshan Lal	1994

5. The petitioner thus averred that the respondent had failed to abide by the principle of “Last come first go”. The action of the respondent was violative of the provisions of Sections 25-B, 25-F, 25-G and 25-H of the

Industrial Disputes Act, 1947 (hereinafter referred to as the Act). He thus claims reinstatement along with all consequential benefits.

6. The respondent while denying the claim of the petitioner had contended that the petitioner was working as a casual labourer in the Seed Multiplication Farm, Auhor. He worked for 39 days in the month of October and November, 1983. Thereafter for 17 days in April and May, 1990. Per the respondent the petitioner had worked casually and even at that time had left work on his own. He had never worked continuously with the respondent from 1983 till 2002.

7. It is further the case of the respondent that the petitioner in the year 1996 worked as a contractor for grading wheat seeds. In this behalf quotations had been invited by the department and the petitioner was a successful bidder and had been awarded the contract for a sum of Rs.13,500/-.

8. The respondent had regularized the services of the workmen who had completed 240 mandays in every calendar year and worked continuously for 10 years or more as a daily waged labourer as per the policy of the Government.

9. Since the petitioner had not worked continuously till the year 1997 as such he had lost his seniority vis-à-vis the seven workmen reflected in para no.5 of his statement of claim. The said workmen had been working continuously from the date of their initial engagement till their regularization. The petitioner thus could not be equated with them.

10. The services of the petitioner were thus dis-engaged by following the proper procedure. The principle of "Last come first go" was followed. The respondent also placed on record retrenchment order and the compensation paid to him by the respondent as Annexure A-5 and Annexure A-6.

8. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those of the statement of claim.

9. On the pleadings of the parties, the following issues had come to be framed for determination by my Ld. Predecessor:

10. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to?

. .OPP

1. Whether the petitioner had abandoned the job on his own.

. .OPR

2. Relief.

11. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS

ISSUES 1 and 2

12. Both the issues are being taken up together as they are intermingled.

13. Per the petitioner he had been working continuously as a daily waged beldar since the year 1983 till his illegal termination on 18.12.2002. It is also claimed by the petitioner that the persons junior to him, who were appointed subsequently have been retained and as such the action of the respondent is violative of the provisions of Sections 25-F and 25-G of the Act. This is in short the pith and subsistence of the petitioner's case.

14. However, per the respondent the petitioner had not worked continuously with the respondent since the year 1983. Initially he was a casual labourer working intermittently in the year 1983 for about 39 days in the months of October and November. He worked with the respondent thereafter in the year 1990 for about 17 days for the months of April and May and in the year 1996 he was literally a contractor having submitted quotations for grading for wheat seeds during Rabi 1996. The work for which have been awarded to him and for the said work he had been paid a sum of Rs.13,500/-. After 1997 the petitioner had worked continuously with the respondent. It is thus the case of the respondent that he was not senior to the seven workmen named by the petitioner in his statement of claim and as such his services were dispensed with on the basis of "Last come first go" after having been served with a notice as envisaged under the provisions of Section 25-F of the Act w.e.f. 18.12.2002. The petitioner had been paid the wages in lieu of one month's notice amounting to Rs.1800/- along with retrenchment compensation to the tune of Rs.4,500/-.

15. Viewed in this perspective the evidence on record also supports the case set up by the respondent. The petitioner himself has placed on record the muster rolls issued to him w.e.f. October, 1983 till December, 2002 by way of additional evidence vide Ex. PA-1. Though the petitioner has testified that he had worked continuously w.e.f. 1.10.1983 but Ex. PA-1 belies his claim. It rather supports the respondent that the petitioner worked for 39 days in the year 1983 and 17 days in the year 1990.

16. On the other hand the respondent has examined Sh. Rajinder Singh Mahajan, Dy. Director of Agriculture, Bilaspur, who apart from tendering his affidavit in evidence has placed on record the documents Ex. RW1/A to Ex. RW1/G which includes the retrenchment notice dated 18.12.2002, the comparative statement in respect of the quotation called for grading of wheat seeds for Rabi 1996 as Ex. RW1.B, the receipt of payment of Rs.13,500/- received by the petitioner in pursuance to the quotations Ex. RW1/C, the receipt thereupon Ex. RW1/D, the order of the Administrative Tribunal dated 18.10.2004 Ex. RW1/E etc.

17. The details of muster rolls and the seniority list have been placed on record by both the parties.

18. The close scrutiny of the ocular and the documentary evidence on record shows that the petitioner started working as daily rated beldar continuously with the respondent after the year 1997. Initially he did work with the respondent but that show only for a period of 39 days in the year 1983 and 17 days in the year 1990. In the year 1996 the petitioner did not work as a labourer but rather a sort of a contract for grading of wheat seeds during Rabi 1996. There was thus a break in his service. The petitioner actually started working continuously with the respondent after the year 1997. The petitioner has not worked with the respondent between 1984 and 1989 and from 1991 to the year 1995. There is a clear cut break in the service rendered by the petitioner. Had the petitioner even worked in all the years without a break and that too without completing 240 days in a calendar year his seniority could have been reckoned atleast for seeking protection of the provisions of Section 25-G of the Act. But in the instant case there was a clear break in his services and as such the period prior to 1997 cannot be counted even for the purposes of seniority.

19. For all the reasons discussed above it cannot be said that the respondent had wrongly fixed the seniority of the petitioner w.e.f. 1997. It is not the case of the petitioner that his termination was violative of the provisions of Section 25-F of the Act. His main contention while appearing as PW1 was only regarding juniors having been retained. In respect of the provisions of Section 25-F there was but a passing reference in his affidavit that his services were dispensed with orally and without any notice. On the contrary the respondent have placed on record the letter dated 18.12.2002 whereby due notice as envisaged under Section 25-F of the Act had been issued to the petitioner. Even one month's salary and compensation had been given to the petitioner at the time of his retrenchment. Since his seniority has been rightly held to the operative in the year 1997, it cannot be said that the respondent had given a go bye to the principle of "Last come first go". It was in fact so. As such no fault can be attributed to the act of the respondent while ordering the termination of the petitioner. Having been in regular employment w.e.f. 1997 he was in fact the last in the seniority and as such had to be the first to go.

20. Thus it cannot be said that the action of the respondent was unlawful. Both the issues are decided accordingly.

RELIEF

21. For all the reasons discussed above the reference fails and is dismissed. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 27th day of April, 2010.

Kr. Chirag Bhanu Singh,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 87/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Chamaru Ram S/o Shri Sajoo Ram, R/o village Kalswai, P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Chamaru Ram S/o Shri Sajoo Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
2. Whether the petition is not maintainable, as alleged. .OPR
3. Whether the petition suffers from the vice of delay and laches. .OPR
4. Whether the petitioner is guilty of suppressio veri. .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. :The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-(r) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

***"25-G. Procedure for retrenchment.-* Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".**

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1005/2007-9916, dated 30.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 598/2008
Date of Institution : 29.10.2008
Date of decision : 20.5.2010

Smt. Champa Devi W/o Shri Narain Singh, R/o Village Lower Wali, P.O. Dhanyara, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Champa Devi W/o Shri Narain Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-
1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
 2. Whether the petition is not maintainable, as alleged. .OPR
 3. Whether the petition suffers from the vice of delay and laches. .OPR
 4. Whether the petitioner is guilty of suppressio veri. .OPR
 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
 6. Relief.
12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-
- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance. 23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008

(Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1271/07-274 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 80/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Chander Pal S/o Shri Mehar Singh, R/o Village & P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Chander Pal S/o Shri Mehar Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.12.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim. 11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . .OPR
6. Relief.

11. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

12. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

13. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

14. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

15. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(i) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

16. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

17. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

18. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

19. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

20. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-(t) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

21. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

22. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.12.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

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24. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

25. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

26. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

27. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

28. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

29. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

30. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 837/2007-10024, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

31. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

32. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

33. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful

retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 80/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Chander Pal S/o Shri Mehar Singh, R/o Village & P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Chander Pal S/o Shri Mehar Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.12.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant

factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.12.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon’ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon’ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon’ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 837/2007-10024, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 82/2009

Date of Institution : 26.2.2009

Date of decision : 20.5.2010

Shri Chater Singh S/o Shri Ranchu Singh, R/o Village Tapohal, P.O. Kot, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Chater Singh S/o Shri Ranchu Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.5.999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an “industrial establishment” within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.5.999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has

prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 839/2007-10018, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

Kr. Chirag Bhanu Singh,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 293/2009

Date of Institution : 29.5.2009

Date of decision : 30.4.2010

Shri Chet Ram S/o Shri Dittu Ram, R/o Village Kalas Jamsai, P.O. & Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Chet Ram S/o Shri Dittu Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on October, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to

4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
2. Whether the petition is not maintainable, as alleged. .OPR
3. Whether the petition suffers from the vice of delay and laches. .OPR
4. Whether the petitioner is guilty of suppressio veri. .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other

workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on October, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1290/07-289 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 85/2005
Instituted on : 18.6.2005
Decided on: : 28.5.2010.

Shri Chint Ram S/o Shri Sawaru Ram, R/o village Kuthal, P.O. Sainji, Tehsil Sunder Nagar, Distt. Mandi,
H.P.

.....Petitioner

Vs

The Executive Engineer, I&PH Division, Sunder Nagar, Distt. Mandi, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. L.B. Sharma, adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy. D.A.

AWARD

1. The reference has been received from the appropriate Govt. seeking adjudication of the following term:
“Whether the termination of services of Shri Chint Ram S/o Shri Sawaru Ram workman by the Executive Engineer, I&PH Division, Sunder Nagar, District Mandi, H.P. w.e.f. 17.12.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and compensation the above aggrieved workman is entitled to?”
2. The workman whose services are alleged to have been illegally terminated died during the course of the proceedings. So much so the statement of claim came to be preferred by the LR's of the deceased Chint Ram.
3. It is the case of the claimants that there predecessor-in- interest, late Shri Chint Ram was engaged as a beldar by the respondent in the year 1980. The respondent uses to give him fictional breaks and never allowed him to complete 240 days in a calendar year. However, during the year 1995 to 2002 the deceased had completed 240 days in each year.
4. It is also the case of the petitioners that the deceased Chint Ram was the senior most employee. The juniors were allowed to complete 240 days whereas the services of the deceased was terminated orally without assigning any reason. The termination was sought to be declared as wrong and illegal w.e.f. December, 2002.
5. While contesting the petition the respondent raised a preliminary objection that the petition is not maintainable. Per the respondent the deceased petitioner was engaged by virtue of an interim order passed by the Hon'ble Administrative Tribunal on 8.9.1995 in the O.A. (M) No.722/95. Eventually on the dismissal of the original application the services of the petitioner was terminated. The reference is with respect to the dis-engagement of the petitioner w.e.f. 17.12.2002. It was a consequence of the dismissal of the original application.
6. On merits it is averred by the respondent that deceased workman had worked on daily wages intermittently w.e.f. 4/85 to 7/89. He abandoned the job of his own on 21.7.1989. The aforesaid workman remained absent for about eight years and filed an original application bearing No.722/95 before the Hon'ble Administrative Tribunal. By virtue of an interim order the services of the workman was recommenced. The said original application came to be dismissed for want of jurisdiction on 21.7.1989. Thereafter the discontinuation of the petitioner w.e.f. 17.12.2002 does not attract the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) but is the result of dismissal of the said original application.
7. Rejoinder was not filed. On the pleadings of the parties, the following issues were framed for determination:
 1. Whether the disengagement from the service of the petitioner by the respondent is proper and justified? .OPP
 2. If the above issue is proved in affirmative to what relief of service benefit the petitioner is entitled to the respondent? .OPP
 3. Whether the petition is not maintainable before this Court? .OPR
 4. Relief.
8. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue 1 : No
 Issue 2 : Yes
 Issue 3 : No
 Relief : Allowed as per operative part of the award.

REASONS FOR FINDINGS**ISSUES NO . 1 and 2**

9. Both the issues are being taken up together for discussion as they are intermingled and co-related.
10. The reference in question relates to the dis-engagement of the deceased Chint Ram w.e.f. 17.12.2002. The perusal of the mandays chart placed on record indisputably shows that from January, 1996 onwards, the deceased workman had completed 240 days in each year till 17.12.2002.

11. In fact it is not even denied by the respondent. There specific and simple case is that since the services of the deceased have been continued in pursuance to the interim directions of the Administrative Tribunal, the provisions of the Industrial Dispute Act are not applicable to the case in hand. The termination of the deceased workman was the direct outcome of the dismissal of original application. It is the pleaded case of the respondent.

12. In furtherance thereto Assistant Engineer Shri Harsh Sharma has appeared as RW1. He deposed that the deceased had assailed his abandonment w.e.f. 21.7.1989 by filing an O.A. (No.722/95) and by virtue of the interim order he had come to be re-engaged. Since the respondent had categorically taken a stand that the deceased had abandoned his job on 21.7.1989 the said factum remained undecided and the original application came to be dismissed for want of jurisdiction. As such the contention of the department regarding voluntarily abandonment on behalf of the deceased was upheld. He further deposed that since the engagement of the petitioner was dependant upon an interim order the dismissal of the O.A. entailed the termination of the deceased and as such the provisions of the Industrial Dispute Act are not applicable in the case.

13. Though no order worth the name showing that the deceased was re-engaged on the basis of the interim order is on record. Nor has the final order passed by the Administrative Tribunal seen the light of the day. Even if it is assumed that the factual narration by the respondent is correct, though the pleadings and the evidence are at variance, but, nonetheless it is an admitted fact that the original application in question came to be dismissed on the grounds of jurisdiction. It is again admitted by the RW1 in his cross-examination. Per him the said petition came to be dismissed on 7.1.2000.

14. It is not disputed that the services of the deceased came to be terminated on 17.12.2002. Even if the preceding 12 months of the alleged dis-engagement are kept in view, the deceased workman had completed more than 240 days, even after the dismissal of the original application by the Hon'ble Tribunal. A vested right had come to be accrued in favour of the deceased as per the requirements of the Industrial Dispute Act. Not only this one thing which clearly emerges from the pleadings and the evidence on record is that there was no decision on merits by the Administrative Tribunal. The original application had come to be dismissed on a technical plea i.e. want of jurisdiction. It cannot thus be inferred that the contention of the respondent had come to be upheld by the Tribunal while disposing off the original application. The approach of the respondent in this behalf is totally misconceived. Since the original application had come to be dismissed on technicalities the continuance of the deceased in service with the respondent and that too continuously for a period of 240 days in each year had vested a right in him as enshrined under the provisions of Section 25-F, as far as the retrenchment was concerned. The respondent thus ought to have resorted to the provisions of the Section 25-F of the Industrial Disputes Act. As discussed hereinabove it was all the more incumbent upon the respondent to do so because even after the dismissal of the O.A., the deceased continued to work as such for atleast 12 calendar months preceding his termination.

15. Another aspect which requires to be highlighted is that the similar situated persons have come to be retained by the respondent, though by virtue of the orders of this Court. If that was so, the deceased was also entitled to the same treatment. More so keeping in view the fact that the respondent is an instrumentality of a welfare State. It could not have acted in an arbitrary manner when the other similar situate persons had been retained, even if in pursuance to dictate of any court. The benefit should have been extended to all without any discrimination. The respondent had accepted the earlier decision of this Court without any demur. I am thus constrained but to void that the respondent have failed to respect the mandate of the Industrial Disputes Act and as such the disengagement of the deceased Chint Ram was in violation of the statutory provisions of the Industrial Disputes Act. The action of the respondent is thus liable to be set aside and quashed. Unfortunately, because of the demise of the workman's reinstatement cannot be ordered. There is nothing on record to remotely suggest that during the forced idleness of the deceased he was not gainfully employed and as such no effective relief can be granted to the deceased Chint Ram. Nonetheless, the respondent is liable to be burdened with compensation for having violated the mandatory provisions of the Industrial Disputes Act and accordingly are burdened with compensation amounting to Rs.50,000/- to be paid to the present petitioners.

ISSUE 3

16. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference in not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

17. For the foregoing reasons discussed hereinabove while setting aside the termination of the deceased workman Chint Ram. The respondent is burdened with compensation for having violated the mandatory provisions of

the Industrial Disputes Act and accordingly the petitioners are held entitled to compensation amounting to Rs.50,000/-. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 28th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 41/2006

Date of Institution : 20-3-2006

Date of decision : 19-6-2010

Chuni Lal s/o Sh. Tikam Ram r/o Village Sujaini, P.O Neoli, Tehsil & District Kullu, H.P.

....Petitioner

Versus

The Executive Engineer, HPSEB(E) Division, Kullu, District Kullu, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, adv.
For the Respondent : Sh. Abhishek Lakhan Pal, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Chuni Lal s/o Sh. Tikam Ram workman by the Executive Engineer, HPSEB (E) Division, Kullu, Distt. Kullu, H.P. w.e.f.26-9-1998 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is short and simple per him he was engaged by the respondent on 26-2-1994 and his services were terminated without any notice on 1-3-2000. The same was violative of the provisions of the section 25-F of the Industrial Disputes Act (hereinafter to the referred as the Act).

3. The respondent was stated to have retained persons juniors to the petitioner while terminating his service. One Vinod Kumar and Anil is still stated to be in services. Not only this the respondent has also engaged fresh hands after the termination of the petitioner. The said action of the respondent was also violative of the section 25-H of the Act.

4. The petitioner had earlier approached the Hon’ble Administrative Tribunal vide O.A. No. (M) 39/2001) but the same was dismissed for want of jurisdiction and hence the present reference. The petitioner thus seeks his reinstatement with all consequential benefits.

5. While contesting the reference the respondent raised preliminary objection vis-à-vis maintainability and the claim being barred by limitation.

6. On merit it is not denied the petitioner was engaged w.e.f. 26-2-1994. However, as per the respondent the petitioner used to frequently remain absent and as such had not completed 240 days in any year. More over he left the job of his own on 25-2-2000. Per the respondent the petitioner was never terminated and as such resorting to the provisions of the Act was not required . The respondent thus sought dismissal of the claim.

7. While filing the rejoinder the petitioner denied the averments in the reply and reiterated those in the statement of claim.

8. Based on the aforesaid pleadings my Ld. Predecessor had framed the following issues for determination on 17-9-2009:

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to? .

. .OPP.

2. Whether the petitioner had worked as casual labour/beldar with the replying respondent till 25-2-2000 and thereafter he abandoned the job on his own.

. .OPR.

3. Whether the petition is barred by time.

. .OPR

4. Whether the petition is not maintainable.

. .OPR

5. Relief.

9. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1	Yes
Issue No.2	No
Issue No.3	No
Issue No.4	No
Issue No.5	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE No. 1 & 2.

10. Both the issues being co-related and intermingled are taken together for decision:

11. In order to countenance the averments of the petitioner the respondents have alleged that the petitioner had abandoned his job w.e.f. 25-2-2000. As per the mandays on record (Ex. R1/C), which is not apparently disputed by the petitioner, the petitioner had not completed 240 days in the preceding 12 months of his termination. The question of the violation of section 25-F may thus not arise in the facts and circumstances of the present case.

12. However, since the respondents had taken a specific stand that the petitioner had abandoned job and the said fact has not been duly proved on record, except a bald statement of the Executive Engineer who has appeared as RW1, to contend that the petitioner had abandoned the job. As it emerges from the deposition of RW1 the Executive Engineer, no show cause was issued to the petitioner regarding the said abandonment. There is in fact no documentary evidence on record that the petitioner had abandoned the job on the said date.

13. The said fact gains significance because as per the petitioner junior to him had been retained by the respondent, which in itself was violative of the provisions of Section 25-G of the Act. It is by now well settled that the principle of 'Last Come First Go' contained in section 25-G is not only confined to workman who were in "continuous service" as required under section 25-B of the Act. That being so even if the petitioner had not completed 240 days in a calendar year preceding his termination, no doubt the provisions of Section 25-F were not applicable but the provisions of Section 25-G would have been squarely applicable in the fact and circumstances of the case. The petitioner categorically alleged that the junior had been retained by the respondent while showing him the door. The seniority list placed on record by the respondent Ex.RW1/B does show that persons juniors to the petitioner were retained by the respondent. The petitioner as per the respondent had been engaged on 26-2-1994. There are innumerable persons who have been appointed subsequently. So much so, one of the workman had been appointed in the year 1997.

14. The respondent having failed to prove that the petitioner had abandoned the job, as a nature corollary, is has to be held that his service were disengaged. It is no denied that no notice had been served on the petitioner as per the requirement of the Act. Thus, as per law the last person to have joined the respondent was to be thrown out first. Apparently it was not done by the respondent. The termination of the petitioner thus has to be held illegal and against the statutory provision of Section 25-G.

15. For all the reason discussed above the termination of the petitioner is held to be bad in the eyes of law. The petitioner had never abandoned the job. Rather, he was unlawfully disengaged against the statutory provisions of the Act.

16. Since the petitioner had failed to discharge the initially onus that he was not gainfully employed during the said period. I do not deem it fit and appropriate to award backwages to the petitioner in the facts and circumstances discussed above.

17. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 3.

18. Nothing has been urged or brought to my notice as to why the reference is barred by time. On the contrary the petitioner has specifically averred in the statement of claim that he had initially approached to the Hon'ble Administrative Tribunal at Mandi vide O.A. No. (M) – 39/2001 which came to be dismissed for want of jurisdiction. The said factum is not denied by the respondent. That being so it could not be said that the claim preferred by the petitioner before this Court was barred by time. In fact the petitioner has approached the wrong forum for the redressal of his grievances. For the same due leverage had to be granted to the petitioner as is envisaged by the provisions of the Limitation act itself, i.e. for approaching the wrong forum. Though strictly speaking the rigors of the limitation act may not strictly apply but even if the provisions of the Act are kept in mind due concession as to be given to the petitioner for approaching the wrong forum under Section 14 of the Limitation Act, 1963. Consequently the issue is decided against the respondent and in favour of the petitioner.

Issue No. 4.

19. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

20. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 26-9-1998 is set aside and quashed. He is directed to be reengaged forth with, along with consequential benefits relating to seniority and continuity of service from the date of his termination, except back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 19th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 74/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Daler Singh S/o Shri Harbhaj Singh, R/o village Riyur, P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Daler Singh S/o Shri Harbhaj Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on November, 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act. 9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

2. Whether the petition is not maintainable, as alleged.

. .OPP

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

. .OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on November, 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B

wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 803/2007-10007, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission

granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 57/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Dalip Singh S/o Shri Laskari Ram R/o Village & P.O. Longani, Tehsil Sarkaghat, Distt. Mandi, H.P.
.....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Dalip Singh S/o Shri Laskari Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 6.4.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (a) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 6.4.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-

H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 821/2007-10003, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 323/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Daman Singh S/o Shri Hira Lal, R/o Village Bhadu, P.O. Darwad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Daman Singh S/o Shri Hira Lal, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 4.12.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing

indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads: “25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 4.12.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon’ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1119/07-380 dated 29.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 1, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of

reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 47/2005

Date of Institution : 16-3-2005

Date of decision : 30-6-2010

Sh. Daulat Ram son of Dhani Ram r/o Village Jandroh, P.O. Maloh, Tehsil Sundernagar, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, (Additional Superintending Engineer) HPSEB(E) Division Sundernagar, District Mandi, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Vijay Thakur, adv.

For the Respondent : Sh. Tarun Pathak, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services w.e.f. 1-3-2001 of Sh. Daulat Ram s/o Sh. Dhani Ram Village Jandroh, P.O. Maloh Tehsil Sundernagar Distt. Mandi by the Executive Engineer H.P. State Electricity Board Division Sundernagar, Himachal Pradesh without complying the provisions of the Industrial Dispute Act, 1947 and certified Standing Orders of H.P.S.E.B is justified or not? If not, what relief of back wages, seniority, reinstatement of services, regularization of services & other consequential service benefits he is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was appointed as a beldar by the respondent board in Electrical Division Sunder Nagar, District Mandi on 26-02-1986. He was allowed to work continuously as such till 28-2-2001. The petitioner was however given fictional breaks in between and as such was never allowed to complete 240 days in any of the years.

3. The work and conduct of the petitioner have been above board and nothing adverse was found against the petitioner during his service. He was further arbitrary and illegally terminated on 1-3-2001 orally. The said act of the respondent was stated to be violative of the provision of Section 25-F of the Act (hereinafter to be referred as the Act) and 14 (2) of the Standing orders applicable to the HPSEB.

4. It is further the case of the petitioner that the respondent had retained persons juniors to him while ordering his termination, namely Sohan Lal, Sauju Ram, Chet Ram, Dinesh, Rajeev Kumar, Hukam Chand Narender Kumar, Prem Singh, Raj Kaur, Sita Ram, Ganga Ram, Tek Chand, Parkash Chand, Amar Singh. The respondent thus was stated to have not followed the principle of “ Last Come First Go” and as such the termination was bad , being violative of even section 25-G of the Act. The petitioner thus sought his reinstatement with all consequential benefit.

5. While disputing the averment of the petitioner the respondent inter-alia raised the preliminary objection of the claim being barred by limitation, it being not maintainable and the petitioner having suppressed material facts from the Court. However on merit it is the case of the respondent that the petitioner was engaged as a dailywaged beldar w.e.f. 26-02-1986 to 28-2-2001 with certain breaks and interruption . He never completed 240 days in any

calendar year. No juniors to the petitioner are alleged to have been engaged. Only those who had completed 240 days in a calendar year were engaged by the field staff. Moreover in the event of the continuous absence of the persons the field unit had taken work from the available persons. Moreover, that the daily rated beldars are retained subject to availability of funds and work and for specific work.

6. While filing the rejoinder the petitioner controverted the averments in the reply and further reiterated those in the statement of claim. 7. I notice that the following issues come to be framed on 27-9-2005 by my Ld. Predecessor.

1. Whether the services of the petitioner were terminated by the respondent w.e.f. March, 2001, without complying the provisions of Industrial Disputes Act, in an improper and un-justified manner? ..OPP.
2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled to? ...OPP.
3. Whether the petition is barred by limitation? ..OPR.
4. Whether the petitioner is entitled to maintain the present petition as alleged? ... OPR
5. Whether the petitioner has not approached the court, as alleged? .. OPR.
6. Whether the services of the petitioner were dis-engaged due to non-availability of funds and work and on completion of specific work for which he was engaged? ...OPR.
7. Relief.

7. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1	Yes
Issue No.2	Yes
Issue No.3	No
Issue No.4	Yes
Issue No.5	No
Issue No.6	No
Issue No.7	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE No. 1, 2 & 6

8. All the three issues are being taken up together for discussion as they are co-related and intermingled:

9. The short and simple case set up by the petitioner is that his termination w.e.f. 1-3-2001 is violative of the provision of the Act, more particularly 25-F and 25-G and of the standing order framed by the respondent board. The respondent is further stated to have retained persons juniors to the petitioner while terminating his services and had thereby violated section 25-G of the Act. On the contrary it is pleaded by the respondent that the petitioner had never completed 240 days in any calendar year and had rather abandoned the job on his own. He was never terminated and as such the violation of the section 25-F or the standing orders does not arise. As far as the principle of "Last Come First Go" is concerned there is no categorical denial by the respondent in this behalf. In generalized terms the said fact is rather admitted by the respondent.

10. The petitioner while appearing as his own witness has reiterated the fact that his service were dispensed with illegally while retaining his juniors and that too by allowing them to complete 240 days in each calendar year. The petitioner in his cross-examination has further admitted that the respondents have retained a few persons namely Rakesh Kumar, Amar Singh, Ganga Ram, Tek Chand, Prakash Chand Prem Singh s/o Sh. Besar, Prem Singh s/o Latoia Ram etc. who were junior to him.

11. On the contrary there is no specific plea that the appointment of the petitioner was for a specific project or a term though in generalized terms it is stated there in that dailywaged beldar were retained subject to availability of work / funds against specific schemes and on completion of the scheme there services used to come to an end automatically. The respondents witness RW1 Sh. Narender Kumar Thakur, Assistant Engineer Electrical Sub-Division HPSEB, Slapper though also has stated that dailywaged beldar was always retained subject to availability of work and fund against specific scheme but there is not evidence in his behalf led by the respondent to remotely show so. He has

further deposed that the petitioner had left the job on his own in March 2001. Apart from his bald assertion there is nothing on record to substantiate the same. Admittedly per him no show cause notice or letter was issued to the petitioner to explain his willful absence. In fact the witness (RW1) was posted in Slapper Sub-Division on 2-4-2008. He has no personal knowledge about the petitioner having abandoned the job nor any documentary evidence had been placed on record in this behalf. As far as the invocation of the Principle of "Last Come First Go" is concerned the witness does not know anything about the same.

12. Apart from the placing on record the mandays chart of the petitioner the seniority list have been placed on record vide Ex. PW1/B to show the continuance of juniors by the respondent. During the course of arguments I had the occasion of going through the record and as per seniority list (as it stood on 30-1-2000), last person was employed by the respondent on 10-6-1998. Ex. PW-1/B also corroborates the same. It has not been categorically denied that the persons named in para (3) of the statement of claim were not junior to the petitioner.

13. Seeing to the mandays chart, no doubt the petitioner had not completed 240 days in the preceding 12 months of his termination and as such the provision of Section 25-F may not come to the rescue of the petitioner. However, it is no more than apparent that the respondent had failed to prove the plea of abandonment. There is nothing on record that the petitioner had abandoned the job after 1-3-2001. The disengagement of the petitioner thus has to come within the ambit of "retrenchment". That being so, the respondent was duty bound to have followed the provisions of Section 25-G of the Act. It was not done in the present case. Moreover, it may be noticed at this juncture that the requirements of 240 days is not a condition precedent for the applicability of Section 25-G. Even if the workman has not completed 240 days, he will be entitled to the protection of the section 25-G and 25-H. Thus the petitioner in any case was entitled to the aforesaid protection. While terminating the petitioner the respondent thus had to retrench the last persons to be engaged. It was admittedly not done in the present case. Not only this, in fact the respondent has engaged a fresh hand as far back as 10-6-1998. While resorting to retrenchment it was this person who had to go first of all. Thus the respondent had violated the provisions of section 25-G and as such action of the respondent is unsustainable in the eyes of law. Moreover the plea of abandonment sought to be raised has been substantiated in any way, as is clear from the discussion held hereinabove.

14. For all the reason discussed above the petitioner is liable to be reengaged. It is however noticed from record that the petitioner had been absenting himself continuously for a period of about three and half years between the year 1995 and 1998. Though he has averred that the respondent had given fictional breaks to him but there is no conclusive evidence to hold so. More so, it could not be believed that the respondent would have given fictional breaks for years at a stretch. The petitioner has also not discharge his initially onus of proving that he was not gainfully employed after his termination. Thereafter in the peculiar circumstances the petitioner is not held entitled to seniority and backwages.

15. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 4 & 5.

16. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the relief the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent

Issue No. 3

17. The materials on record are indicative of the petitioner having approached the respondent from time to time after his retrenchment and requested for his re-engagement but of no avail. Left with no option, he later raised an industrial dispute which came to be referred to this Court for adjudication under Section 10(1) of the Act, vide Notification No.11- 1/7(Lab) I.D./04-Sundernagar dated 15 March, 2005.

18. In Divisional Manager, HPFC & another Vs. Garibu Ram, latest HLJ 2007 (HP) 1160, the delay of more than 10 years was held to have not come in the way of the workman whose services were illegally terminated. Having surveyed various rulings on the point, the Hon'ble High Court of Himachal Pradesh inter alia observed:

" While taking note of the entire case law with regard to the delay and laches, this Court consistently has held that the provisions of the Limitation Act would not apply but, however, depending upon the facts and circumstances of each case, the principle of delay and laches have to be seen and applied. A delay of even 14 years has been held not to come in the way of the poor man, whose services have been illegally terminated in claiming his relief under the provisions of the Industrial Disputes Act. In Deepa Ram's case (supra), there was a delay of 12 years. In Ramesh Chand's case (supra) there was a delay of 9 years. In Mohinder Kumar's case (supra), there was a delay of 14 years....."

19. The petitioner, who is undeniably poverty-stricken, is stated to be illiterate. In view of the facts and circumstances of this case, the principle of delay and laches cannot be held applicable to his case. The issue under discussion is therefore held in his favour and against the respondent.

RELIEF

20. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 1-3-2001 is set aside and quashed. He is directed to be reengaged forth with. The petitioner shall however not be entitled to seniority or back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 30th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 54/2002
Instituted on : 16.2.2002
Decided on: : 16.6.2010.

Shri Deewakar Singh S/o Shri Bhagwat Singh, C/o Smt. Manju Devi, Himchal Fiber Ltd. VPO Barotiwala, Distt. Solan, H.P.

.....Petitioner

Vs

The Managing Director, M/s. Nipso Poly Fabriks Ltd, 30-31, Industrial Area, Mehatpur, Distt. Una, H.P.

.....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. Virender Sharma, Adv.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“Whether the action of the Managing Director Nipso Poly Fabriks Ltd. Industrial Area, Mehatpur, Distt. Una, H.P. not to allow Sh. Deewakar Singh S/o Shri Bhagwat Singh workman to resume duty w.e.f. 29.5.1999 after ailment inspite of Medical Fitness Certificate is legal and justified? If not, what back-wages, seniority service benefits and relief the concerned workman is entitled to?”

2. The case set out by the petitioner in his statement of claim is that he was appointed as helper by the respondent on 20.6.1996. He was retrenched on 29.5.1999, when he was not allowed to resume duty inspite of his showing the medical fitness certificate. His last pay drawn was Rs.1700/- per month.

3. The petitioner was never served with any explanation, show cause notice or a warning. There were no complaints regarding his work and conduct. The action of the respondent was thus bad in the eyes of law.

4. Further per the petitioner he was ill since 20.1.1999 and was undergoing treatment from ESI dispensary, Mehatpur. That on 6.2.1999 the petitioner was further referred to the District hospital, Una. The management was intimated about the same. The doctors had thereupon advised him rest for 30 days. Due to the seriousness of the ailment he continued taking his treatment from District hospital w.e.f. 27.2.1999 and also informed the management by registered post from time to time.

5. After obtaining the fitness certificate the petitioner went to resume job on 29.5.1999 but he was not taken back on the rolls by the management. The petitioner was stated to have completed more than 240 days in each

year as such the action of the respondent was violative of the provisions of Section 25-F, 25-N and 25-G of the Industrial Disputes Act (hereinafter referred to as the Act). The petitioner thus sought his reinstatement with all consequential benefits.

6. While contesting the claim the respondent inter alia raised the preliminary objections vis-à-vis non-joinder of necessary parties, the order of reference being without jurisdiction and the reference being not maintainable.

7. On merits it is the case of the respondent that the petitioner had joined the management on 1.7.1997. He never reported for duty on 29.5.1999. They had received an application dated 29.5.1999 along with photostat copy of medical certificate by post. It was received some time in first week of June, 1999. The respondent thereupon directed the petitioner to appear before the CMO, Una to obtain the fitness certificate and submit the same within 10 days vide a letter dated 15.6.1999. The said letter was received back by the management with the remarks that the addressee does not reside at the given address. Thereafter nothing was heard from the petitioner. As per the respondent it is the workman who had himself refrained from reporting for duty. It is not disputed that the petitioner had an unblemished previous record. The intimation of his sickness w.e.f. 27.2.1999 was duly received. Per the respondent the petitioner had abandoned job as such there was no question of his retrenchment. As per an additional submission made by the respondent it was averred that they were willing to allow the petitioner to join duty.

8. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.

11. I notice that the following issues came to be framed by my Ld. Predecessor on 16.7.2004:
 1. Whether the action of the respondent not to allow Shri Deewakar Singh petitioner to resume duty w.e.f. 29.5.99 after ailment inspite of medical certificate is legal and justified? . . .OPP
 2. If issue no.1 is not proved to what service benefits including back-wages and seniority the petitioner is entitled to? . . .OPP
 3. Whether the reference is unsustainable as alleged? . . .OPR
 4. Whether the petitioner abandoned the job voluntarily as alleged in preliminary objection No. B? . . .OPR
 5. Whether the order of reference is without jurisdiction and bad in law and not maintainable as alleged? . . .OPR
 6. Relief.

12. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue No.1 :	No
Issue No.2 :	He is entitled to continuity in service and seniority along with 50% backwages
Issue No.3 :	No
Issue No.4 :	No
Issue No.5 :	No
Issue No.6 :	Allowed as per operative part of the award.

REASONS FOR FINDINGS

ISSUES NO . 1, 2, and 4

13. All the three issues are being taken up together for discussion as they are co-related and intermingled.

14. The simplicitor case set up by the petitioner is that because of his ailment he could not attend his job and he remained under treatment till 29.5.1999. When he had reported at the factory along with the fitness certificate issued on 26.5.1999 he was not allowed to join back. Appearing as a witness the petitioner has corroborated the said version and has placed on record the prescription slip Ex. PW1/A, his discharge slip dated 11.2.1999 Ex.PW1/B. Further per the petitioner he had sent an application to the Manager for leave vide Ex. PW1/C. Due to the seriousness of the situation the petitioner was admitted at zonal hospital Una. Eventually on 27.2.1999 he was taken to his native place in UP. He remained under treatment from 27.2.1999 to 25.5.1999. On 26.5.1999 the doctor had issued a fitness certificate vide Ex. PW1/E. The petitioner had sent the fitness certificate along with application Ex. PW1/F to the respondent on 29.5.1999. The said communication was sent by registered post acknowledgement due (Ex.PW1/G). Further per the petitioner his absence in the aforesaid period was due to his illness. He had intimated the change of his address by registered post to the respondent vide his letter dated 4.6.1999.

15. On the contrary the case set out by the respondent is that the petitioner had himself abandoned job. The management had sent a letter dated 15.6.1999 in pursuance to the letter dated 29.5.1999 sent by the petitioner asking him to appear before district hospital Una to obtain fitness certificate and to submit the same within 10 days. However the petitioner never reported back for duty thereafter. Further per the respondent the intimation of his sickness was received by them on 27.2.1999 only. In furtherance of his stand taken by the respondent they have examined one Ravi Dutt Sharma, Manager of the respondent company to substantiate the plea. He has reiterated the same version as stated in the reply. The respondent further placed on record the attendance register extract of the workmen pertaining to the months of March, 1999 and April, 1999 vide Ex. RX2 and Ex. RX3. The perusal of the attendance for March, 1999 show that the petitioner Deewakar Singh was on medical leave till 29th March, 1999. On 30 and 31 March, 1999 he was shown as absent. Eventually in the attendance register pertaining to April, 1999 he was shown to have left service on 1.4.1999. Thus as is explicitly clear the respondent did know about the ailment of the petitioner and he was granted medical leave by the respondent. However his services were disengaged on 1.4.1999 itself. Atleast, it cannot be said that the petitioner had abandoned job w.e.f. 1.4.1999. The interruption on account of sickness is reckoned to be continuous service and in any case till 29.3.1999 the respondent have given medical leave to the petitioner. It cannot be thus be a case of abandonment in any sense. His further absence was also related to sickness. The petitioner was down with tuberculosis and as per the medical certificate was declared fit to resume job only on 26.5.1999. That being so the time when the petitioner was undergoing treatment was to be considered as continuous service. In fact there is no evidence on record that thereafter the petitioner had abandoned job. As per the record the respondent had already recorded in their attendance register that the petitioner had left service on 1.4.1999. The stand of the respondent thus is fallacious and cannot be taken at its face value. Rather it is apparent from annexure Ex. RX2 that the name of the petitioner had been struck off from the rolls of the management w.e.f. 1.4.1999 itself. It thus cannot be said to be a case of abandonment as is sought to be portrayed by the respondent. Any communication sent by the respondent after March, 1999 asking the petitioner to report for duty was in fact sham communications as the name of the petitioner had been already struck off from the rolls w.e.f. 1.4.1999. The action of the respondent was thus illegal and unsustainable in the eyes of law. Even otherwise there is no consideration of medical certificate sought to be placed on record by the petitioner for his ailment. The petitioner was never given an opportunity to tender his explanation for his absence on medical grounds though the respondent management was aware of the same. On 1.4.1999 the management unilaterally struck off the name of the petitioner from its rolls. The action of the respondent was not only arbitrary but also against the provisions of Industrial Disputes Act. The plea of abandonment set up by the respondent as such is not tenable. Even otherwise if the workman remained absent and failed to report for duty it was imperative to follow the principles of natural justice by giving an opportunity to the workman to explain his absence. In this behalf support can be elicited from the judgment of Supreme Court titled as M/s. Scooters India Ltd. vs. M. Mohammad Yaqub (2001 LLR 54). The respondent thus had also violated the basic principle of natural justice as is apparent from the discussion held hereinabove.

16. For all the reasons discussed above it is held that the action of the respondent in not allowing the petitioner to resume duty w.e.f. 29.5.1999 were illegal and unjustified. The petitioner had never abandoned job. In fact his name was struck off from the rolls of the respondent company on 1.4.1999. The action of the respondent is thus totally unsustainable and illegal in the eyes of law.

17. Consequently the termination of the petitioner is set aside and quashed. He is ordered to be reinstated forthwith. Seeing to the inhuman conduct of the respondent management wherein the workman inflicted tuberculosis was denied resumption of job and that too in violation of the principle of natural justice and unilaterally striking of his name from the rolls w.e.f. 1.4.1999 itself, the petitioner is held entitled to 50% back-wages w.e.f. March, 1999 till date. He shall be entitled all consequential benefit including seniority and continuity in service. The aforesaid issues are decided accordingly in favour of the petitioner.

ISSUES NO. 3 and 5

18. Nothing has been brought to my notice as to how the reference is unsustainable or without jurisdiction. Rather, for the reasons discussed above it is more than apparent that the reference was valid. Nothing to the contrary has been proved period to sustain the plea set up by the respondent. It is accordingly decided against the respondent.

RELIEF

19. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with 50% backwages with continuity in service and seniority from the date of his termination i.e. 1.4.1999. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 16th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 450/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Desh Raj S/o Shri Gulab Singh, R/o Village Gwela, P.O. Sandhole, Tehsil Sarkaghat, District Mandi,
H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Desh Raj S/o Shri Gulab Singh by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 1.8.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the

Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.8.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

26. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

27. The infraction of the provisions of Section 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-H. In this behalf support can ably be drawn from the judgment of the Hon’ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred *“that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....”* There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon’ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest

Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1752, dated 31.3.07. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 24, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.’s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent’s allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case.

The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 157/2007
Date of Institution : 1.11.2007
Date of decision : 27.4.2010

Shri Desh Raj S/o Shri Sunder Ram, R/o Village Poli, P.O. Thuran, Tehsil Jhandutta, District Bilaspur, H.P.
....Petitioner

The Deputy Director of Agriculture, Bilaspur, District Bilaspur, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

The appropriate government has sought a determination on the following point of Reference:

“Whether the termination of services of Shri Desh Raj S/o Shri Sunder Ram workman by the Deputy Director of Agriculture, Bilaspur, District Bilaspur, H.P. w.e.f. 06-10-2004 without complying the provisions of the Industrial Disputes Act, 1947 whereas junior to him were retained by the employer as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. It is the case of the petitioner, as extracted from the statement of claim that he was appointed as a beldar on daily wage basis by the respondent w.e.f. 15.11.1994. He continuously worked with the department till 30.11.1998 when his services were abruptly terminated without following the procedure laid down under the Industrial Disputes Act, 1947 (hereinafter to be referred to as the Act).

3. The petitioner had challenged his illegal termination before the Administrative Tribunal and the petitioner had come to be re-engaged vide its interim order dated 8.3.1999.

4. It is further the case of the petitioner that the respondent had retained the persons junior to the petitioner namely Shri Bhagwant Kishore S/o Shri Roshan Lal who was engaged on 17.11.1994 and one Chaman Lal S/o Jodh Singh who had been employed by the respondent on 1.10.1997. Both were junior to the petitioner and as such the retrenchment of the petitioner was illegal. The petitioner claimed that he had completed 240 days as enshrined under Section 25B of the Act. No notices have been issued to the petitioner before his retrenchment and as such the action of the respondent was in derogation to the provisions of Sections 25F and 25G of the Act.

5. While contesting the claim, the respondent raised a preliminary objection that the petitioner had been engaged to a specific project i.e. the National Watershed Development Project, Gharna Matla in Development Block, Jhandutta, Bilaspur. It was a Central Government funded project for a period of five years. The petitioner had worked in the said project for the said period. The applicant worked in the project w.e.f. 15.11.1994 till 31.10.1998. From then onwards the control of the project was transferred to the Soil Conservation Wing of the department of Agriculture w.e.f. 1.10.1998 whereupon the petitioner worked for one month with the department. It is further the case of the respondent that since the project was for five years and perhaps knowing fully that his services would last till the closer of the project, the petitioner had left the work on his own accord.

6. The petitioner had approached the Hon'ble Administration Tribunal vide O.A. No.33/1999 and in pursuance to the orders of the Tribunal the petitioner had been engaged at the Seed Multiplication Farm, Auhar as the NWDPR project was already over. The original application No.33/1999 having come to be dismissed on 24.8.2004 the services of the applicant were terminated by following the proper procedure envisaged in law.

7. On merits the respondent raised the similar plea that the petitioner had been appointed to a specific project, however, he had left the job of his own accord.

8. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those of the statement of claim.

9. On 18.2.2008 my Ld. Predecessor framed the following issues for determination:

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to? . . .OPP
2. Whether the petitioner had abandoned the job on his own. . .OPR
3. Relief.

10. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS

ISSUES 1 and 2

11. Both the issues are being taken up together as they are inter-related and to avoid repetition.
12. The case of the petitioner is primarily that the persons junior to him were retained by the respondent as such his retrenchment was in violation of the provisions of Section 25G of the Act. A challenge was also laid that his termination was in violation of the provisions of Section 25F of the Act.
13. On the other hand the respondent have set up a plea that the petitioner had been employed against a specific work and thereupon apprehending that his services would be terminated on the completion of the project, the petitioner had abandoned work.
14. The petitioner while appearing as PW1 has reiterated his pleadings to contend that his services were terminated on 30.11.1998 without any notice. He had approached the Hon'ble Administrative Tribunal and he had been reinstated with full back-wages. It was further deposed by the petitioner that one Bhagwant Kishore S/o Shri Roshan Lal whose name was figuring at serial no.9 of the seniority list and he had been engaged by the respondent on 17.11.1994 and one Chaman Lal S/o Jodh Singh who was employed on 1.10.1997 have been retained by the respondent. The petitioner further deposed that the contention of the respondent that he was a seasonal worker was also incorrect, in view of the mandays chart annexed along with, by him. The petitioner has also deposed that he had received a notice along with one month's wage in lieu thereof and compensation as per the provisions of Section 25F of the Act.
15. The respondent has examined one Rajinder Singh Mahajan, Dy. Director, Agriculture, Bilaspur as RW1. The witness has deposed that the petitioner worked as a casual labourer under the National Watershed Development Project in Jadhunta Block. It was a Central Government funded project for five years. The petitioner also worked in the project w.e.f. 15.11.1994 till 31.10.1998. The control of the project was transferred to the Soil Conservation Wing of the department of agriculture w.e.f. 1.10.1998. The petitioner worked for one month after transfer of the project to the Soil Conservation Wing and thereafter he left the work on his own accord. The petitioner was re-engaged in pursuance to the interim orders of the Hon'ble Administrative Tribunal dated 8.3.1999. The original application having been finally dismissed and the services of the petitioner were terminated by following the proper procedure, as envisaged under law. The witness has denied that the persons junior to the petitioner have been retained by the department. However, the Dy. Director has admitted that Bhagwant Kishore was working in the department. Per him the said Bhagwant Kishore was not appointed in the project but was a daily wager engaged with the department. He has admitted that the department has prepared a seniority list of beldars.
16. The petitioner had also placed on record the list of mandays chart w.e.f. November, 1994 to October, 2004 as Ex. PA-1 and the final seniority list of the daily waged workers as it stood on 31.5.2002 issued by the Dy. Director, Agriculture, Bilaspur vide Ex. PA-2.
17. The respondent had also placed on record the documents Ex. RW1/A to Ex. RW1/G which includes the interim orders passed by the Tribunal, the copy of the reply filed to the industrial dispute raised by the petitioner, order of retrenchment and the seniority list.
18. As far as the termination of the petitioner w.e.f. 6.10.2004 is concerned, it is more than clear that the respondent had paid one month's wage in lieu of the notice to the petitioner along with retrenchment compensation amounting to Rs.7800/-. The said action has been taken by the respondent after the dismissal of the original application preferred by the petitioner before the Hon'ble Administrative Tribunal. Apparently the respondent had respected the mandate the provisions of Section 25F of the Act, even if it was a counter blast to the filing of the original application before the Hon'ble Administrative Tribunal. Though there is no evidence led by the petitioner to corroborate the said factum. However, the fact remains, as abundantly clear from the mandays chart Ex. PA-1 that the petitioner had worked continuously from the year 1994 till the year 1998 and he had completed 240 days prior to his initial termination. The seniority list, which has been placed on record by both sides Ex. PA-2 it further transpires that Shri Bhagwant Kishore and Chaman Lal were appointed after the petitioner. Bhagwant Kishore having been appointed on 17.11.1994 and Chaman Lal having been appointed on 1.10.1997. There is one seniority list placed on record in respect of daily waged workers. Even the respondent placed the same on record. It is not that the persons appointed to the project were assigned a separate seniority list and the others a separate seniority list as was tried to be portrayed by the RW1 Rajinder Singh Mahajan, Dy. Director. Per, him Bhagwant Kishore was not appointed against a project but was a daily

wager with the department. The seniority list on record belies his statement. Though the claim of the department is that the petitioner has been appointed against a specific project but there is not a single document on record remotely suggesting so. There is also nothing on record to show that the petitioner had abandoned his job. Had the petitioner not reported to duty the respondent would have issued some sort of notice asking the petitioner to report back, failing which his services shall be dispensed with. There is nothing of this sort on record.

19. The statement of RW1 shall not suffice to prove abandonment. Not only this as per the provisions of Section 25G of the Act. It is more than clear that the respondent had failed to abide by the principle of 'last come, first go'. In that eventuality it is Chaman Lal, whose name figure at serial no.10 of the seniority list and who was appointed by the department on 1.10.1997 was to be retrenched. In this behalf the petitioner had very categorically pleaded in para 5 of the statement of claim that the respondent has retained persons juniors to him while ordering his termination but neither in the reply the respondent denied the allegation nor there is any evidence on record to show that the two Bhagwant Kishore and Chaman Lal were not junior to the petitioner. The respondent for the reasons best known to them have maintained a studied silence in this behalf. As such an adverse inference otherwise could have been drawn against them on this count. However, as discussed above the seniority list on record itself conclusively proves that both Bhagwant Kishore and Chaman Lal have been appointed by the respondent after the petitioner and as per the mandate of the provisions of Section 25-G in fact that it was Chaman Lal who was liable to be terminated.

20. It is by now well settled that Section 25-H is applicable to all retrenched workmen and not only to those covered by Section 25-F of the Act.

21. It is thus clear that the retrenchment of the petitioner was illegal and unjustified being in contravention of Section 25G of the Act. The respondent had retained the persons junior to the petitioner and as such his termination of this accord was bad in the eyes of law. The petitioner is liable to be reinstated with all consequential benefits including seniority and continuity of service. As the petitioner has led no evidence to show that he was not gainfully employed in the said interregnum, the petitioner is not entitled to any back-wages. Moreover, since the principles of no work no pay has obtained statutory force, I do not intend to grant any back-wages to the petitioner while ordering his re-instatement.

RELIEF

22. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed being in violation to the provisions of Sections 25-G and 25-H of the Act. He is ordered to be reinstated with all consequential benefits, except back-wages. The respondent shall reinstate the petitioner within 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today this 27th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 16/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Desh Raj S/o Shri Beli Ram, R/o Village & P.O. Saklana, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Desh Raj S/o Shri Beli Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 8.2.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division. . It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
 2. Whether the petition is not maintainable, as alleged. .OPR
 3. Whether the petition suffers from the vice of delay and laches. .OPR
 4. Whether the petitioner is guilty of suppressio veri. .OPR
 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
 6. Relief.
12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-
- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (a) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (i) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

1. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 8.2.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with. 25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by

the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 710/07-10078, dated 8.12.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 15, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his

grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

Kr. Chirag Bhanu Singh,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 16/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Desh Raj S/o Shri Beli Ram, R/o Village & P.O. Saklana, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Desh Raj S/o Shri Beli Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 8.2.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such

area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 8.2.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the

orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 710/07-10078, dated 8.12.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 15, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 300/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Desh Raj S/o Shri Barestu Ram, R/o Village & P.O. Sayoh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Desh Raj S/o Shri Barestu Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 9.2.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act

were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 9.2.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon’ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 858/07-809 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 3, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 499/2008

Instituted on : 14.7.2008

Decided on : 1.5.2010

Shri Deva Anand S/o Shri Bhalkhu Ram, R/o Village Laka, P.O. & Tehsil Sarkaghat, District Mandi, H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Deva Nand S/o Shri Bhalkhu Ram, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 1.1.1999 in Dharampur Division of HPPWD and he was transferred to Sarkaghat Division on 31.3.2005. He continued to work there as such till 10.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005. The Assistant Engineer, Sarkaghat had told him on 11.7.2005 that his services had been dispensed with by orders of Executive Engineer, Dharampur.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been

retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case...."

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in his affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to his, were still working with the respondent. Of these workmen, however, only two namely Shashi Lal and Roshani Devi, who figure at serial nos. 646 and 652 in the seniority list Ex. PW1/B and are shown to have been engaged on April 6, 1999 and July 4, 1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of these workmen having been retained in service at the time the petitioner was retrenched. It may also be noticed that the respondent's witness Sh. Naresh Kumar Sharma, Executive Engineer, HP.PWD Dharampur, admitted in no ambiguous words the petitioner's suggestion in his cross-examination as RW1 *"that Smt. Roshani Devi w/o Nag Ram and Shashi Kant S/o Bihari Lal, whose names figure at serial nos. 652 and 646 respectively in the seniority list Ex. PW1/B, were engaged as daily wagers on 4.7.1999 and 6.4.1999 respectively and are still working with the department."* In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. Over and above the order dated 17.6.2005 passed by the Chief Engineer cum- Specified Authority according permission for retrenchment of workers pertained to workmen of Dharampur Division alone. Even though the said exercise of power by the Chief Engineer has already been held to be void, but, even assuming it was legally exercised the petitioner still could not have been retrenched by the respondent because after 31.3.2005 he was working in Sarkaghat Division. His retrenchment was thus otherwise not tenable on the basis of the provisions of Section 25-N.

30. The petitioner in paragraph 8 of his affidavit Ex. PW1/A inter alia averred *"that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members...."* There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

31. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

32. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held: "It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

33. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/26/05-2151, dated 23.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated May 26, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

34. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

35. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

36. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 220/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Dhan Dev S/o Shri Hirda Ram, R/o Village & P.O. Samour, Tehsil Sarkaghat, District Mandi, H.P.
....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Dhan Dev S/o Shri Hirda Ram by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 3.5.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No. 486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to

avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
2. Whether the petition is not maintainable, as alleged. .OPR
3. Whether the petition suffers from the vice of delay and laches. .OPR
4. Whether the petitioner is guilty of suppressio veri. .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a

judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says: “25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 3.5.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman ”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Roshani Devi W/o Nag Ram appears at serial no.652 and his date of engagement is reflected as 4.7.1999, it is clear that the said Roshani Devi had been engaged after the

petitioner. She was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same. 27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred *"that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members...."* There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 505/07-1698, dated 31.3.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11- 23/84(Lab)1D/07-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 3/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Dharam Pal S/o Shri Sarwan, R/o Village Chhater, P.O. Barang, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Dharam Pal S/o Shri Sarwan by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 11.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . . .OPR
3. Whether the petition suffers from the vice of delay and laches. . . .OPR
4. Whether the petitioner is guilty of suppressio veri. . . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . . .OPR
6. Relief. . . .OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 11.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 463/07-10096, dated 8.12.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 15, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful

retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 471/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Dharam Pal S/o Shri Chet Ram, R/o Village & P.O. Bharangh (Bharahan), Tehsil Sarkaghat, District Mandi, H.P.Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Dharam Pal S/o Shri Chet Ram by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 11.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim. 11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the

Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (a) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (b) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (c) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(a) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says: "25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 11.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of

any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25- H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred “*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*” There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he

prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held: "It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1735, dated 31.3.07. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 24, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 471/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Dharam Pal S/o Shri Chet Ram, R/o Village & P.O. Bharangh (Bharahan), Tehsil Sarkaghat, District Mandi, H.P.Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Dharam Pal S/o Shri Chet Ram by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 11.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act. 9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-
1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
 2. Whether the petition is not maintainable, as alleged. . .OPR
 3. Whether the petition suffers from the vice of delay and laches. . .OPR
 4. Whether the petitioner is guilty of suppressio veri. . .OPR
 5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . .OPR
 6. Relief. . .OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads: “25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and (rrr) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But is has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 11.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25- H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25- H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred "*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*" There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held: "It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1735, dated 31.3.07. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 24, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is

rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 59/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Dharam Pal S/o Shri Safria Ram, R/o village Hukal, P.O. Longani, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent
Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Dharam Pal S/o Shri Safria Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on December, 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.
3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.
4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.
5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.
6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.
7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.
8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.
9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.
10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.
11. Based on the pleadings the following points came to be framed for determination:-
 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
 2. Whether the petition is not maintainable, as alleged. . . .OPR
 3. Whether the petition suffers from the vice of delay and laches. . . .OPR
 4. Whether the petitioner is guilty of suppressio veri. . . .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on December, 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the

rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 835/2007-9946, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-

wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 199/2009

Date of Institution : 27.2.2009

Date of decision : 20.5.2010

Shri Dharamveer S/o Shri Gopal Dass, R/o Village Thana, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Dharamveer S/o Shri Gopal Dass by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP 2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be

employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was

considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 895/07-331, dated 21.1.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 29, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 139/2006
Instituted on : 30.8.2006
Decided on : 1.6.2010.

Shri Dina Nath S/o Shri Arjun Singh, R/o Village & P.O. Bhargaon, Sub Tehsil Kotili, District Mandi, H.P.

.....Petitioner

Vs

The Senior Executive Engineer, H.P.S.E.B, Electrical Division, Mandi, H.P.

.....Respondent

For the Petitioner : Sh. Shyam Kumar Sharma, Adv.
For the Respondent : Sh. J.S. Chauhan, Adv.

AWARD

1. The reference has been received from the appropriate Government for determination:

“Whether the termination of services of Sh. Dina Nath S/o Shri Arjun Singh workman by the Senior Executive Engineer, H.P.S.E.B. Electrical Division Mandi, H.P. w.e.f. 16.4.2000 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”
2. While filing the statement of claim the petitioner avers that he was engaged as a beldar on daily wages by the respondent Board w.e.f. October, 1997 and he continued to work as such till 15.4.2000. He had completed 240 days preceding his illegal retrenchment.
3. The services of the petitioner had been terminated arbitrarily and illegally. The respondent has also not assigned seniority to the workman as such violated the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The petitioner had also requested the respondent to reengage him against some work but the respondent had engaged four other beldars namely Smt. Uma Devi, Surinder Singh, Tota Ram and Jagdish Kumar. All the four were juniors to the petitioner and they had been retained by the respondent.
4. The termination was stated to be in violation of the provisions section 25-F of the Industrial Disputes Act and against the principle of ‘last come first go’. The petitioner thus sought his reengagement along with all consequential benefits.
5. The respondent Board while contesting the claim inter alia raised the preliminary objections vis-à-vis maintainability, estoppel, limitation and non-joinder of necessary parties and the reference is patently time barred.
6. On merits it is the case of the respondent that the petitioner was engaged against work which was casual in nature. He had thus worked with certain interruption and breaks coupled with his willful absence during 15.4.2000. Since the work of the said scheme under which the petitioner had been engaged was completed on 15.4.2000, his services were automatically terminated on the same date. Per the respondent the petitioner had been appointed as casual worker against a specific scheme work. The petitioner was stated to have not completed 240 days in a calendar year. Further, per the respondent the services of the petitioner had been terminated after completion of specific work once on 14.7.1999. Even earlier after the completion of the work of LWSS Ambla Tilla Stage 300/HESD Saigaloo, the services of the petitioner had been terminated by issuing a notice dated 14.7.1999. The petitioner was re-engaged for casual work again on 5.10.1999. After the completion of the said work the services of the petitioner was terminated by issuing a legal notice on 23.2.2000. It was denied that any person juniors to the petitioner had been engaged by the respondent. The respondent thus sought the dismissal of the claim.
7. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.
8. I notice that the following issues came to be framed on 15.7.2006.
 1. Whether the dis-engagement from the service of the claimant by the respondent is proper and justified? . . .OPP
 2. If the above issue is in affirmative to what relief of service benefits the petitioner is entitled to?. . .OPP
 3. Whether the petition is not maintainable before this court being time barred. . .OPR
 4. Relief.
9. I have heard the Id. counsel for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 :	No
Issue No.2 :	He is entitled to reinstatement with continuity in service and seniority.
Issue No.3 :	No.
Issue No. 4 :	Allowed as per operative part of the award.

REASONS FOR FINDINGS**ISSUES NO. 1 and 2**

10. Both the issues are being co-related and taken up together for discussion and to avoid repetition.
11. It is not apparently in dispute that the petitioner had not completed 240 days prior to his termination on 16.4.2000. The petitioner has himself pleaded so. Even the mandays chart Ex. RW1/C shows that the petitioner had completed 192 days in the 12 calendar months preceding his termination. It may thus not be possible to hold that the petitioner had in continuous service or not less than one year as per the requirement postulated by the Section 25-F.
12. However, the respondent has raised a plea that the petitioner had been engaged against specific work and as such when the work came to an end his services were dispensed with and that too by issuing a notice. It is pleaded case of the respondent that though the last muster roll was issued to the petitioner till 15.5.2000 but notices were issued to the petitioner on 23.2.200 (Ex. RW1/B).
13. The respondent had placed on record the purported notice issued to the petitioner vide Ex. RW1/B. In fact Ex. RW1/B is a one month advance notice. Once the respondent in its wisdom have resorted issuing of a one month advance notice and other condition precedent as enumerated in clause (b) and (c) of the provisions of Section 25-F were also required to be followed. The same was however not done in the present case. There is no such evidence on record for the same.
14. Not only this, there is nothing on record remotely suggest that the petitioner had been appointed against a specific work. Though it is pleaded by the respondent that the petitioner was appointed against the construction of LWSS Ambla Tilla Stage 300/Head Saigloo but there is no evidence on record to corroborate the said version.
15. The petitioner while leading an additional evidence has further placed on record the mandays chart in respect of workmen vide Ex. PA and Ex. PB which includes Devki Nandan, Pawan Kumar, Shiv Ram, Kaul Ram, Uma etc. Many of them were appointed in the year 1998. Ex. PB is the seniority list of daily wagers which also show so.
16. Section 25-G of the Act postulates that any workmen is to be retrenched and he belongs to a particular category of workman, the employer shall ordinarily retrenched the workman who was the last person to be employed in that category. The provisions of Section 25-G are mandatory. It was strictly required to be followed. In fact the seniority list of daily wagers is prepared primarily to follow the principle of "last come first go." The action of the respondent is in not adhering to the statutory provisions of the Section 25-G in itself fatal for the respondent. Not only this the said contravention of the provisions of Section 25-G also casts a serious doubt over the plea raised by the respondent that the petitioner had been employed against a specific work. The seniority list Ex. PB itself demolishes the plea set by the respondent. Therefore a possibility cannot be ruled out that the respondent had given a fictional break to the petitioner to deprive him his legal right under Section 25-F. Be it as it may, the fact however remains that the respondent by retaining junior persons to the petitioner have violated the provisions of Section 25-G of the Industrial Disputes Act and as such the termination of the petitioner is indeed bad in the eyes of law. Initial onus was of the petitioner to prove that he was not gainfully employed during his forced idleness. There is no whisper in his testimony, that being so, the petitioner is not entitled to benefit of back-wages. He however, entitled to the seniority and continuity of service w.e.f. his illegal termination.
17. The issues are accordingly decided in favour of the petitioner and against the respondent.

RELIEF

18. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 1st day of June, 2010.

Kr. Chirag Bhanu Singh,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 328/2009

Date of Institution : 30.5.2009

Date of decision : 30.4.2010

Shri Duni Chand S/o Shri Ghona Ram, R/o Village Morala, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Duni Chand S/o Shri Ghona Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an “industrial establishment” within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “Industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be

employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest

Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1088/07-816 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 328/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Duni Chand S/o Shri Ghona Ram, R/o Village Morala, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Duni Chand S/o Shri Ghona Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been

indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
 - (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record

lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &

1088/07-816 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 181/2001
Instituted on : 20.9.2001
Decided on : 11.6.2010.

Shri Gandhi Ram S/o Shri Salo Ram, R/o VPO, Sherpura, The. Dalhousie, Distt. Chamba, H.P.

.....Petitioner

Vs

General Manager, Chamera Hydro-Electronic Project, Khairi, Stage-I, Distt. Chamba, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.R. Bhardwaj, AR
For the Respondent : Sh. V.K. Gupta, AR

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Sh. Gandhi Ram S/o Shri Salo Ram, w.e.f. 13.4.1998 vide order dated 13.4.1998, by the General Manager, Chamera Hydro Electric Project, Stage-I, Khairi, Distt. Chamba, H.P. is legal and justified? If not, what relief of service benefits, seniority, back-wages and amount of compensation, the above workman is entitled to?”

2. In furtherance of the reference the petitioner while submitting the statement of claim contends that he was appointed as a beldar Grade-III in the pay scale 1100-1300 by the respondent in terms of the interim orders dated 13.1.1993 passed by the Hon'ble High Court of Himachal Pradesh in CWP No.488/91. In pursuance to the same the petitioner's appointment letter was issued by the respondent and he joined duties on 26.2.1993.

3. Eventually the Writ Petition came to be dismissed as not maintainable and as sequel thereto the interim orders came to be vacated w.e.f. 20.12.1996.

4. The petitioner continued to work even after 20.12.1996 continuously in the same place and post with the respondent. However on 13.4.1998 the services of the petitioner was terminated vide a letter of the even date annexed along with the statement of claim as Annexure- P3.

5. The petitioner thus contends that the action of the respondent in not complying the provisions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) was illegal as neither any notice nor any amount was paid in lieu thereof. For want of notice neither any compensation amount was paid to him.

6. It is further the case of the petitioner that the respondent had appointed number of beldars in work-charge/regular cadre of the project even after the termination of the petitioner but he had not been offered any opportunity of reemployment and as such action of the respondent was also violative of the provisions of Section 25-H of the Act. 7. Furthermore, the petitioner was a land oustee of Chamera Hydro Electronic Project and the management had appointed number of such workmen whose acquired land was less than that of the petitioner. Not only this, there were even such workmen appointed by the management whose land has not been acquired at all as was stated by the Deputy Commissioner Chamba in his affidavit before the Hon'ble High Court of H.P. The petitioner was not employed gainfully after his illegal termination.

8. It was thus sought that the termination of the petitioner be set aside and quashed. He be ordered to reinstatement from the date of his illegal termination with all consequential benefits.

9. While contesting the claim the respondent inter alia raised the preliminary objections that the petitioner had not approached the Court with clean hands and had suppressed the material facts. The reference was bad in law for non-joinder of necessary parties and the reference being barred by virtue of orders dated 12.1.1999 passed by the Hon'ble Supreme Court of India. It is further contended by the respondent that the State of H.P. had acquired land for construction/operations and maintenance of the Hydro Project being run by the respondent. That for the purpose of welfare, settlement and rehabilitation of families of the land oustee and understanding had been reached inter se the State and the respondent to employ 700 persons in the project. It was further decided that the persons to be given employment by the respondent was to be identified and sponsored by District Revenue Authority.

10. It is not denied that the petitioner had approached the Hon'ble High Court by way of Writ Petition and by virtue of the interim orders passed by the Hon'ble High Court on 13.1.1993, the petitioner had been engaged by the respondent. The said Writ Petition came to be finally disposed of on 20.12.1996 for want of jurisdiction, with liberty to the parties to approach the Civil Court for the redressal of their grievances.

11. It is further the case of the respondent that they waited for considerable period, for the notice from the Civil Court and kept the action of disengagement of the petitioner pending so that there be no contempt of Hon'ble Civil Court, as it was expected that the petitioner's may approach the Civil Court. When no notices were received by the respondent and on further inquiry it transpired that no petition had been filed, the petitioner was disengaged from service vide letter dated 13.4.1998.

12. The petitioner is thereafter stated to have approached the Hon'ble Supreme Court by way of a SLP which came to be disposed of vide order dated 12.1.1999 wherein it was ordered that if any of the petitioners secure sponsorship within four weeks from the date of order, they shall be considered for employment by the respondent on priority basis. The petitioner had also filed a Civil Suit in the Court of Ld. Civil Judge, Dalhousie in the month of April, 1999. The reference is thus stated to be illegal and without jurisdiction.

13. That the petitioners were engaged temporarily in compliance with the interim orders of the Hon'ble High Court of H.P. and the disengagement of such persons after the vacation of the interim orders did not cast any obligation on the respondent to comply with the provisions of the Industrial Disputes Act. The petitioner is further

stated to be outside the purview of the provisions of Section 25-H of the Act as they could have been employed only if sponsored by the District Revenue Authority. Since their names had not been sponsored they were not be liable to be engaged.

14. The petitioner in his rejoinder controverted the contentions of the respondent and reiterated the stand taken in the statement of claim.

15. On 25.5.2004 my Ld. Predecessor had framed the following issues for determination:

1. Whether the termination of services of the w.e.f. 13.4.1998 by respondent is illegal and unjustified? .
 .OPP
2. If the issue No.1 is not proved to what relief of service benefits, seniority, back-wages, amount of compensation, the petitioner is entitled to?
 . .OPP
3. Whether the petitioner has concealed material, as alleged?
 . .OPR
4. Whether the claim petition is not maintainable and bad for non-joinder of necessary parties in view of preliminary objection No.3.
 . .OPR
5. Relief.

16. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

- | | |
|--------------|--|
| Issue No.1 : | Yes |
| Issue No.2 : | Partly yes |
| Issue No.3 : | No |
| Issue No.4 : | No |
| Issue No.5 : | Partly allowed as per operative part of the Award. |

REASONS FOR FINDINGS

ISSUE NO. 4

17. The respondent has very vociferously urged that the present petition is not maintainable as the appropriate Government in the present case vis-à-vis the respondent is the Central Government. The reference by the State Government is not maintainable in the present forum.

18. The respondent would further contend that in view of a decision titled as Taj Din vs. Chief Engineer Incharge, Dulhasti Hydroelectric Project and Anr, the Ministry of Labour and Employment, Government of India had issued circular whereby the appropriate Government in respect of National Hydroelectric Power Corporation (NHPC) was held to be the Central Government. The respondent has also sought to place reliance on the judgment of the Steel Authority of India Limited and Ors. Vs. National Union Waterfront Workers and Ors. dated 30.8.2001 to buttress their argument that in relation to the NHPC the Central Government is the "appropriate authority".

19. The respondent had further placed on record a copy of the Gazette of India dated 5th of May, 2008 carrying a notification issued by the Ministry of Labour and Employment of the even date reading thus:

"GSIR.336 (E)- In exercise of the powers conferred by Section 39 of the Industrial Disputes Act, 1947 (14 of 1947); the Central Government hereby rescinds the notification of the Government of India in the Ministry of Labour published in the Gazette of India, Extraordinary, vide number S.O. 556(E), dated 3rd July, 1998, except as respects things done or omitted to be done before such rescission."

20. The Government of India vide the aforesaid notification has rescinded the earlier notification dated 3rd July, 1998 whereby the State Government had been declared to be the "appropriate Government" in relation to certain Central Public Sector Undertakings and their subsidiaries, corporations and autonomous bodies specified in schedule, which inter alia included the NHPC.

21. It would be apposite to first highlight and mention a few relevant facts at this stage. The Central Government in exercise of powers conferred in it under Section 39 of the Act had notified the State Govt. to be the "appropriate authority" in respect of certain Public Undertakings, Corporations and boards as per the schedule annexed along with vide notification dated 3rd July, 1998, the NHPC was one of them. In the year 2001 the Hon'ble Supreme Court in a judgment titled as Steel Authority of India and Ors vs. National Union Waterfront Worker held that the NHPC was a instrumentality of the Central Government under Article 12 of the Constitution of India. The judgment

stopped short of saying that in the said case the appropriate Government would thus be the Central Government. Despite the aforesaid judgment the Central Government in its wisdom vide letter dated 19th of April, 2002 (Annexure PB filed along with the reply to the application dated 13.9.2007 in respect of maintainability) clarified that in view of the Steel Authority of India's judgment the powers of appropriate Government except under Section 25-L(b) of the Industrial Disputes Act, 1947 will be vested with the State Governments for the CPSU's its subsidiaries/corporations specified from Serial No.1 to 86 in the schedule annexed to the notification dated 3.7.1998. It would be relevant point out that the name of the NHPC figures at serial no. 86th in the schedule. Admittedly thereafter Taj Din case on the basis of which the Ministry of Labour had again issued a circular on 3.5.2007 wherein the Central Government was held to be the appropriate authority. The letter dated 30.5.2007 being merely clarificatory in nature does not effect the statutory provisions of the Act and the notification issued thereupon. However since the earlier notification dated 3rd July, 1998 stands rescinded w.e.f. 5th of May, 2008, the appropriate Government's in respect of NHPC w.e.f. the said date would be the Central Government. Thus only after 5th of May, 2008 the Central Government is the appropriate authority in case of the NHPC.

22. It is by now well settled with the operation of law is prospective unless it is ordered to be retrospective in nature. Till 5th of May, 2008 as is clear from the notification dated 3rd July, 1998 and as per the schedule annexed thereto the power of the appropriate authority had been delegated to the State by the Central Government. The present reference relates to year 2001 and as such the "appropriate Government" in the present case had to be the State Government. It is thus clear that all the references pending and made by the State Government as an "appropriate authority" till 5th May, 2008 are maintainable before this Court. Though any reference thereafter shall not be maintainable as the appropriate authority after 5th of May, 2008 is the Central Government. The issue is accordingly decided against the respondent and in favour of the petitioner.

ISSUE NO.1

23. It is admitted that the petitioner had come to be appointed by the respondent by virtue of a interim order dated 13.1.1993 passed by the Hon'ble High Court in CWP No.488/1991. It is also not in dispute that the engagement was subject to the final outcome of the writ petition. It had been categorical made clear to the petitioner as per the appointment letter issued to the workman (EX. RW1/E).

24. The workman came to be engaged by the respondent on 18.2.1993. The said writ petition came to be disposed of on 20th December, 1996. Consequently the interim order also came to be vacated therein.

25. The respondent did not disengage the services of the workman immediately after the vacation of the stay and dismissal of the writ petition. After about one year and four months, on 13.4.1998 the workman were shown the door, though purportedly in view of the dismissal of the writ petition. Strangely it took one year and four months for the respondent to realize that the writ petition had been dismissed.

26. At this stage it would be relevant to reproduce the ground pleaded by the respondent for the said delay. Para 7 of the reply filed by the respondent read thus:-

"That after the said orders, respondents waited for the considerable period, in wait of the notice from the Civil Court, and kept the action of disengagement of the petitioners pending so that there may not be any sort of contempt of Hon'ble Civil Court as it was expected that the petitioner might have raised a petition before the Hon'ble Civil Court in conformity with Hon'ble High Court orders, but when no notice was received, respondent, of it's own, enquired from the Civil Court, Dalhousie and ultimately after finding that there was no petition, the respondent relieved off the petitioner late Shri Suneet Singh of his engagement vide letter dated 13.4.1998 (Copy Annexure R-4)"

27. No doubt the appointment of the workman was conditional and subject to the final outcome of the writ petition, however having continued the workman for more than one year, the respondent was estopped from resorting to the dismissal of the writ petitioner. The explanation given and discussed hereinabove also does not seem to be reasonable and prudent. It is seemingly fallacious. No doubt the petitioner could not have claimed equity in the facts and circumstances discussed above but after having been allowed to continue for more than a year and that too in "continuous service" the respondent rather lost the right to disengage the petitioner except after resorting to the provisions of the Industrial Disputes Act.

28. The question thus which arises for consideration is whether the action of the respondent in terminating the services of the workman after one year and four months after the vacation of the stay would amount to retrenchment as per the requirement of the Act or not. The word retrenchment is defined in Section 2 (oo). It read thus:-

"2(a) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf.”

29. Further per the provisions of Section 25-B of the Act “continuous service” has been defined to mean uninterrupted service for a period of one year, during the period of 12 calendar months preceding the date with reference to which calculations is to be made and the days required to be completed in the aforesaid period is 240 days in the present case.

30. Section 25-F further envisages that no workman employed in a industry who has been in “continuous service” for not less than one year under the employer shall be retrenched except as per the provisions enunciated therein.

31. The workman in the present case having completed the “continuous service” for more than one year as per the requirements of Section 25-B. The termination of the workman after more than one year the dismissal of the writ petition thus vested a right to the workman with respect the retrenchment as envisaged in Chapter VB of the Act.

32. Though, the Ld. authorized representative for the petitioner would contend that the engagement of the petitioner being in compliance to the interim orders passed by the Hon’ble High Court at best was adhoc, casual or temporary in nature. In this behalf he placed on judgment of the Hon’ble Supreme Court titled as Vidyavardbhaka Sangha and another vs. Y.D. Deshpande and others (2007) 2 SCC (L&S) 320. I am afraid the ratio of the said judgment would not apply to the facts of the present case as it pertained to appointments for a specified period and on adhoc basis. Admittedly those circumstances the appointment comes to an end by efflux of time and the person holding such post has no right to continue any further. In the instant case not doubt it was a conditional appointment, but it still could not be termed as adhoc or a casual engagement. After vacation of the interim orders and dismissal of the writ petition the respondent continued with the services of the workman regularly for almost one year and four months. It is thus inferable that the respondent had sufficient work in the said interregnum. If nothing else, the uninterrupted and continuous engagement of the petitioner for more than one year, not only gave them a vested right as per the provisions of the Act but also estopped the respondent from taking any contrary stand. It is not the case that the respondent had approached the Hon’ble Supreme Court. It is rather the workmen who had filed the SLP. There was no stay granted by any court and as such the continuance of the workman for such a long time cannot be said to be a adhoc or a specified appointment for a particular period. More strange is the ground espoused by the respondent in their reply to the statement of claim. Fearing contempt proceedings of a order which never came to be passed the respondent kept on waiting for a notice from the Civil Court. It is strange to believe. The corporation as the NHPC cannot be believed to have waited for some years for the Civil Court to pass same stay orders to order the termination of the workman.

33. It is no doubt true that initially the workman might have accepted employment conditionally. At that point of time it may not be engagement in the real sense of the term. However, after having continued for more than one year and that too continuously as is required under Section 25-B of the Act it ceased to be conditional. It thereafter cast an obligation on the respondent that henceforth the services of the workmen were to be dispensed with as per the procedure established by law. I say so because the engagement of the workman in the present case is not governed by article 309 of the Constitution of India. The engagement of this nature is neither governed by recruitment and promotion rules framed under the Constitutional mandate. It is an engagement on daily wages. Once a workman complete a minimum of 240 days in one year as per the mandate of the Act certain right come to be vested in him. He can thus be presumed to have come to believe that henceforth his termination would be as per the procedure established by law. That admittedly was not done in the present case. The termination of the workman thus has to be termed illegal. It cannot be sustained in any manner.

34. It is admitted fact as discussed above that the workman in the present case had come to be initially employed by virtue of interim orders passed by the Hon’ble High Court. Had the respondent not allowed the workman to complete more than one year, the service of the workmen would have come to an end by virtue of the interim orders.

35. Another features which startlingly comes to the fore is that the Civil Court more precisely the Id. Additional District Judge Fast Track Court, vide his judgment dated 6.9.2005 which has been placed on record by the petitioner in one of the reference titled as Gandhi Ram vs. GM, Chamera Hydro Electronic Project, Chamba had directed by way of an injunction to sponsor the names of the petitioner and seven other workmen similar situate to be sponsored by the respondent or grant financial package to them as per the agreement dated 5.3.1992 arrived inter se the parties. In this view of the matter too the respondent was either to grant a package to the workmen or to ensure employment to them. During the course of argument it was however brought to my notice that the three of the workmen namely Gandhi Ram, Suneet Singh and Desh Raj in pursuance to the aforesaid judgment have opted to exercise option of taking the package. If that be so the workman shall be entitled to one of the reliefs granted by the Civil Court i.e. either the package or the re-engagement. The aforesaid orders have come to be passed by the Civil Court as a sequel to the observations of the Hon’ble High Court in CWP No.488/91 whereby the petitioner and the other similar situate workmen were given the liberty to approach the competent forum.

36. In those circumstances while holding that the termination of the petitioner to be illegal and ordering the reengagement of the workman I do not deem it just and proper to order the payment of back-wages to the workman. However, the respondent shall pay an amount of Rs.20,000/- to the workman for having violated the statutory mandate of the Industrial Disputes Act. The issue is decided accordingly.

ISSUE NO. 3

37. Nothing has been urged nor anything has been brought to my notice as to how the reference is bad for non-joinder of necessary parties. Moreover for the reasons discussed above it does not seem that any party who was necessary for the just decision of the case had not been impleaded to the lis. The issue is decided accordingly.

ISSUE NO. 2

38. Nothing has been urged before me as to how the petitioner had suppressed material facts.

39. Though it has been pleaded by the respondent that the workman approached the Civil Court and even filed SLP against the orders of the Hon'ble High Court but the same would not amount to suppression of material fact as the cause in the aforesaid right was on different footings. As discussed above the right of the petitioner has fractured as far as the present cause goes after having put in more than one year even after the dismissal of the CWP No.488/91. It cannot thus be inferred that the petitioner had concealed material fact from this court. The issue is decided accordingly.

RELIEF

40. For the foregoing reasons discussed hereinabove supra, the reference is partly allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged at the same place and post forthwith. He shall be entitled to continuity in service and seniority from the date of his termination, except back-wages. The petitioner shall however be entitled to Rs.20,000/- as compensation for having violated the statutory provisions of the Act as ordered hereinabove. It is however made clear that the workmen who have opted for the package as per the directions of the Civil Court dated 6.9.2005 shall be entitled to either the package or reengagement as ordered above. The respondent shall either pay the entire package amount to the workman or failing which shall re-engage the workman. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 11th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 325/2009
Date of Institution : 30.5.2009
Date of decision : 30.4.2010

Shri Gandhi Ram S/o Shri Bhuru Ram, R/o Village Parchu, P.O. Sajayo Piplu, Tehsil Sarkaghat, Distt. Mandi,
H.P.Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent
Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Gandhi Ram S/o Shri Bhuru Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 14.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? .OPP
2. Whether the petition is not maintainable, as alleged. .OPR
3. Whether the petition suffers from the vice of delay and laches. .OPR
4. Whether the petitioner is guilty of suppressio veri. .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. .OPR
6. Relief. .OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:- Issue 1 :Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.

Issue 2 :	No
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 14.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi

Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1255/07-264 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 428/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Smt. Geeta Devi W/o Shri Ajit Singh, R/o Village Thana, P.O. Kangoo Ka Gehra, Tehsil Sarkaghat, District Mandi, H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Smt. Geeta Devi W/o Shri Ajit Singh, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 1.7.1999 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

. .OPP

2. Whether the petition is not maintainable, as alleged.

. .OPR

3. Whether the petition suffers from the vice of delay and laches.

. .OPR

4. Whether the petitioner is guilty of suppressio veri.

. .OPR

5. Whether the petitioner is estopped from filing the claim petition by her act and conduct.

. .OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services.

Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
 - (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads: "25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an

- accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1.7.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only one namely Roshani Devi, who figures at serial no. 652 in the seniority list Ex. RW1/C and is shown to have been engaged on July 4, 1999, was indubitably junior to the petitioner. The said seniority list is indicative of Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the

provisions of Section 25-G and 25- H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred *"that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members...."* There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/45/2005 & 608/07-1781, dated 4.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11- 23/84(Lab)1D/2007-Mandi dated April 11, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from

the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 507/2008
Instituted on : 14.7.2008
Decided on: : 1.5.2010

Shri Gian Chand S/o Shri Diwan Chand, R/o Village Dalhoun, P.O. Tanihar, Tehsil Sarkaghat, District Mandi,
H.P.

....Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Gian Chand S/o Shri Diwan Chand, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 1.3.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. . .OPR
6. Relief. . .OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of

retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads: “25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.3.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same. 27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred "*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*" There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest

Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 505/07-1698, dated 31.3.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.’s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent’s allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 96/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Gulab Singh S/o Shri Kanshi Ram, R/o Village Hawani, P.O. Ropari, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Gulab Singh S/o Shri Kanshi Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been

indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
 - (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 990/2007-10015 dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 26, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 92/2006
Instituted on : 30.8.2006
Decided on : 3.6.2010.

Shri Gurdas Ram S/o Shri Lakhu Ram, R/o Village & P.O. Swamipur Bagh, Tehsil Anandpur Sahib, District Ropar, Punjab.

.....Petitioner

Vs

M/s. Punjab Laminates (Pvt.) Ltd. 9-10, Industrial Area, Mehatpur, District Una, H.P.
Reference under section 10 (1) of the Industrial Disputes Act, 1947.

.....Respondent

For the Petitioner : Sh. R.K. Singh Parmar, AR
For the Respondent : Sh. Vikramjeet Sharma, Adv.

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Sh. Gurdas Ram S/o Sh. Lakhu Ram workman by the Management of M/s. Punjab Laminates (Pvt.) Ltd. , 9-10, Industrial Area, Mehatpur, District Una, H.P. w.e.f. 4.6.97 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. While filing the statement of claim the petitioner contends that he was working as a unskilled Mazdoor with the respondent since 27.7.1992. On 16.6.1996, during the course of his employment he met with an accident and sustained injuries and remained under treatment in ESI Dispensary Bharatgarh (Ropar) and had even been referred to PGI, Chandigarh.

3. The petitioner had resumed his duty as per recommendations of the Medical Board for about two months. Again he had to undergo treatment. However, the respondent treated him as having abandoned job and ordered his termination w.e.f. 4.6.1997 vide an order dated 29.9.1997.

4. Further per the applicant the said termination is illegal as his services ought to have been counted as continuous service as he had absented due to temporary disablement caused by an accident arising out of and in the course of his employment and as such he was deemed to have been in continuous service. His services therefore had to be dispensed with as per the requirement of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). Even otherwise abandonment has been held to be retrenchment and as such the non-issuance of notice under Section 25-F of the Act amounted to retrenchment. The petitioner has been paid no compensation amount nor had any notice been served upon him. The petitioner had been held to be 40% disabled and in case the management was not in agreement with the said findings of the medical board they should have preferred an appeal against the same. The petitioner thus claims that his termination be set aside and he be reinstated with full back-wages.

5. The respondent while contesting the claim inter alia raised the preliminary objection vis-à-vis a cause of action, estoppel, locus standi and the claim being not maintainable.

6. On merits it is the case of the respondent that the petitioner had been offered light work but he failed to resume job and had rather sent a letter to the respondent that he is unable to perform his duties due to his physical condition. The petitioner asked the respondent to clear his dues and consequently the respondent had paid the petitioner in full. Per the respondent the petitioner has not been terminated or retrenched by the respondent. The petitioner has left the job on his own.

7. It is further averred by the respondent that they have paid the compensation including all dues to the petitioner. 8. The petitioner in his rejoinder controverted the contentions of the respondent and reiterated the stand taken in the statement of claim. 9. On the basis of the pleadings on record my Ld. Predecessor framed the following issues for determination:

1. Whether the disengagement from service of the petitioner is proper and justified? . . .OPP
2. If the above issue No.1 is proved in affirmative to what relief the petitioner is entitled from the respondent? . . .OPP
3. Whether the claim petition is maintainable before this Court? . . .OPR
4. Relief.

10. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue No.1 : No

Issue No.2 : He is entitled to reinstatement along with full back-wages with continuity and seniority in service.

Issue No.3 : Yes.

Issue No.4 : The claim petition is allowed.

REASONS FOR FINDINGS

ISSUES NO . 1 and 2

11. Both the issues are being taken up together as they are correlated and to avoid repetition.

12. It is apparently not in a dispute that the petitioner was working with the respondent since 27.7.1992 as the same has been admitted in the pleadings as well as by the RW1 Shri Naseeb Kumar, Manager of the respondent company. It is also not in dispute that on 16.9.1996 the petitioner had met with an accident during the course of his employment. He remained admitted in the PGI and eventually after his discharged medical board had recommended him placement in a light duty.

13. Per the petitioner his services came to be dispensed with by the respondent w.e.f. 4.6.1997, which is against the provisions of the Industrial Disputes Act. The respondent however has taken a stand that due to ill health the petitioner himself had abandoned job. They had given him opportunities to join light duties but he did not report to duty and consequently his services automatically came to be terminated by way of abandonment. It is further averred by the respondent that the petitioner had himself written a letter to the respondent that he has unable to perform duty and as such he asked the management to clear his dues. Consequently he was paid the compensation and all amounts due to him. 14. To substantiate the stand taken by the respondent they have examined one Naseeb Kumar as RW1. He is the Manager of the Company. While admitting that the petitioner was employed with the company on 27.7.1992, he also admitted that the petitioner had met with an accident. Further per him the company had agreed to give him light duty as per the recommendation of the board and consequent upon the same the company had sent communications to the petitioner to resume his job on 10.7.1997 as Ex. RW1/B, 13.8.1997 Ex. RW1/D and reminder dated 22.12.1997 Ex. RW1/E. He has further deposed that after the accident and before his resignation all his claim has settled including the amounts spent by him on his medication.

15. Apart from the statement of the witness discussed above there is no documentary evidence about the alleged claim and medical bills including compensation alleged to have been paid to the petitioner. The respondents have also placed on record one acknowledgement Ex. RW1/C vide which the first communication dated 10.7.1997 was sent to the petitioner. The said RAD is neither stamped nor it is made out from its bare perusal as to when it was sent.

16. Not only this the respondents have also placed on record a letter dated 29.5.1999 Ex. RW1/A wherein the petitioner is stated to have himself expressed his desire to abandon job. The respondent had termed it as resignation. I am afraid that the pleas raised by the respondent in the reply are self detrimental and contradictory. This letter Ex. RW1/A was sent on 29.5.1999. If that was so, it is clear that the said letter was sent after about two years of the termination or abandonment by the petitioner. It cannot be thus inferred that by way of the said letter the respondent had presumed that the petitioner does not want to continue with the management and his dues be cleared. Though, the respondent management has pleaded that because of his desire to quit the respondent had paid to the petitioner in full. The respondent had also paid the compensation including all dues to the petitioner. If it was done, it was done after May, 1999.

17. There is also no evidence on record as to what amount was paid and when it was paid, to whom it was paid. There is no receipt. There is no explanation as to why compensation was granted and what were the dues paid to the petitioner. In fact because of the accident the petitioner was also entitled to compensation under the Workman Compensation Act. Apparently even the same was not granted to the petitioner.

18. The plea of abandonment on the basis of the letter dated 29.5.1999 (Ex. RW1/A) is not sustainable at all. In fact the document is also doubtful, as it was initially dated as 24.12.1997. The respondent already having taken action detrimental to the interest of the petitioner where back 1997, it cannot take resort to subsequent communication dated 29.5.1999 (Ex. RW1/A) in support of their plea of abandonment. It cannot be sustained in any sense.

19. Since it is admitted that the petitioner had sustained injuries during course of employment, it is indeed true that the absence of the petitioner was caused by an accident arising out and in the course of employment. It was to be counted as continuous service as per the requirement of the provisions of Section 25-B of the Act. In that sense of the matter before terminating the petitioner the respondent had to resort the provisions of Section 25-F of the Act. More particularly because the absence from duty is not covered by any of the exceptions enumerated in sub clause a, b, bb, c of the Section 2 (oo) of the Act. That being so, at best absence simplicitor could have been held to be misconduct. The termination of services of the employee on the ground of misconduct cannot be resorted to without holding inquiry or complying with the provisions of Act. The termination of services of the employee on the ground of the absence thus amounts to retrenchment and the employer is under a legal obligation to follow the procedure prescribed under Section 25-F of the Act. The respondent has failed to do so.

20. The termination of the petitioner thus is in violation of the provisions of the Section 25-F of the Act.
21. The petitioner while appearing as PW1 has discharged his initial onus by deposing that he tried his best to secure employment elsewhere, but in vain and he is unemployed till date. No evidence contrary has been placed on record by the respondent. Not only this the conduct of the respondent management in denying the statutory rights to the petitioner in furtherance to the accident sustained by him during course of employment by not even tendering the compensation as visualized by the Workman Compensation Act, I deem it just and proper to award full back-wages to the petitioner from the date of his illegal termination.

22. The issues are decided accordingly in favour of the petitioner.

ISSUE NO.3

23. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

24. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with full backwages with continuity in service and seniority from the date of his termination. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 3rd day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 92/2006
Instituted on : 30.8.2006
Decided on : 3.6.2010.

Shri Gurdas Ram S/o Shri Lakhu Ram, R/o Village & P.O. Swamipur Bagh, Tehsil Anandpur Sahib, District Ropar, Punjab.

.....Petitioner

Vs

M/s. Punjab Laminates (Pvt.) Ltd. 9-10, Industrial Area, Mehatpur, District Una, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. R.K. Singh Parmar, AR
For the Respondent : Sh. Vikramjeet Sharma, Adv.

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Sh. Gurdas Ram S/o Sh. Lakhu Ram workman by the Management of M/s. Punjab Laminates (Pvt.) Ltd. , 9-10, Industrial Area, Mehatpur, District Una, H.P. w.e.f. 4.6.97 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. While filing the statement of claim the petitioner contends that he was working as a unskilled Mazdoor with the respondent since 27.7.1992. On 16.6.1996, during the course of his employment he met with an accident and sustained injuries and remained under treatment in ESI Dispensary Bharatgarh (Ropar) and had even been referred to PGI, Chandigarh. 3. The petitioner had resumed his duty as per recommendations of the Medical Board for about two months. Again he had to undergo treatment. However, the respondent treated him as having abandoned job and ordered his termination w.e.f. 4.6.1997 vide an order dated 29.9.1997.

4. Further per the applicant the said termination is illegal as his services ought to have been counted as continuous service as he had absented due to temporary disablement caused by an accident arising out of and in the

course of his employment and as such he was deemed to have been in continuous service. His services therefore had to be dispensed with as per the requirement of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). Even otherwise abandonment has been held to be retrenchment and as such the non-issuance of notice under Section 25-F of the Act amounted to retrenchment. The petitioner has been paid no compensation amount nor had any notice been served upon him. The petitioner had been held to be 40% disabled and in case the management was not in agreement with the said findings of the medical board they should have preferred an appeal against the same. The petitioner thus claims that his termination be set aside and he be reinstated with full back-wages.

5. The respondent while contesting the claim inter alia raised the preliminary objection vis-à-vis a cause of action, estoppel, locus standi and the claim being not maintainable.

6. On merits it is the case of the respondent that the petitioner had been offered light work but he failed to resume job and had rather sent a letter to the respondent that he is unable to perform his duties due to his physical condition. The petitioner asked the respondent to clear his dues and consequently the respondent had paid the petitioner in full. Per the respondent the petitioner has not been terminated or retrenched by the respondent. The petitioner has left the job on his own.

7. It is further averred by the respondent that they have paid the compensation including all dues to the petitioner.

8. The petitioner in his rejoinder controverted the contentions of the respondent and reiterated the stand taken in the statement of claim.

9. On the basis of the pleadings on record my Ld. Predecessor framed the following issues for determination:

1. Whether the disengagement from service of the petitioner is proper and justified? . . .OPP
2. If the above issue No.1 is proved in affirmative to what relief the petitioner is entitled from the respondent? . . .OPP
3. Whether the claim petition is maintainable before this Court? . . .OPR
4. Relief.

10. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

- | | |
|--------------|--|
| Issue No.1 : | No |
| Issue No.2 : | He is entitled to reinstatement along with full back-wages with continuity and seniority in service. |
| Issue No.3 : | Yes. |
| Issue No.4 : | The claim petition is allowed. |

REASONS FOR FINDINGS

ISSUES NO . 1 and 2

11. Both the issues are being taken up together as they are corelated and to avoid repetition.

12. It is apparently not in a dispute that the petitioner was working with the respondent since 27.7.1992 as the same has been admitted in the pleadings as well as by the RW1 Shri Naseeb Kumar, Manager of the respondent company. It is also not in dispute that on 16.9.1996 the petitioner had met with an accident during the course of his employment. He remained admitted in the PGI and eventually after his discharged medical board had recommended him placement in a light duty.

13. Per the petitioner his services came to be dispensed with by the respondent w.e.f. 4.6.1997, which is against the provisions of the Industrial Disputes Act. The respondent however has taken a stand that due to ill health the petitioner himself had abandoned job. They had given him opportunities to join light duties but he did not report to duty and consequently his services automatically came to be terminated by way of abandonment. It is further averred by the respondent that the petitioner had himself written a letter to the respondent that he has unable to perform duty and as such he asked the management to clear his dues. Consequently he was paid the compensation and all amounts due to him.

14. To substantiate the stand taken by the respondent they have examined one Naseeb Kumar as RW1. He is the Manager of the Company. While admitting that the petitioner was employed with the company on 27.7.1992, he also admitted that the petitioner had met with an accident. Further per him the company had agreed to give him light duty as per the recommendation of the board and consequent upon the same the company had sent communications to the petitioner to resume his job on 10.7.1997 as Ex. RW1/B, 13.8.1997 Ex. RW1/D and reminder dated 22.12.1997 Ex. RW1/E. He has further deposed that after the accident and before his resignation all his claim has settled including the amounts spent by him on his medication.

15. Apart from the statement of the witness discussed above there is no documentary evidence about the alleged claim and medical bills including compensation alleged to have been paid to the petitioner. The respondents have also placed on record one acknowledgement Ex. RW1/C vide which the first communication dated 10.7.1997 was sent to the petitioner. The said RAD is neither stamped nor it is made out from its bare perusal as to when it was sent.

16. Not only this the respondents have also placed on record a letter dated 29.5.1999 Ex. RW1/A wherein the petitioner is stated to have himself expressed his desire to abandon job. The respondent had termed it as resignation. I am afraid that the pleas raised by the respondent in the reply are self detrimental and contradictory. This letter Ex. RW1/A was sent on 29.5.1999. If that was so, it is clear that the said letter was sent after about two years of the termination or abandonment by the petitioner. It cannot be thus inferred that by way of the said letter the respondent had presumed that the petitioner does not want to continue with the management and his dues be cleared. Though, the respondent management has pleaded that because of his desire to quit the respondent had paid to the petitioner in full. The respondent had also paid the compensation including all dues to the petitioner. If it was done, it was done after May, 1999. 17. There is also no evidence on record as to what amount was paid and when it was paid, to whom it was paid. There is no receipt. There is no explanation as to why compensation was granted and what were the dues paid to the petitioner. In fact because of the accident the petitioner was also entitled to compensation under the Workman Compensation Act. Apparently even the same was not granted to the petitioner.

18. The plea of abandonment on the basis of the letter dated 29.5.1999 (Ex. RW1/A) is not sustainable at all. In fact the document is also doubtful, as it was initially dated as 24.12.1997. The respondent already having taken action detrimental to the interest of the petitioner where back 1997, it cannot take resort to subsequent communication dated 29.5.1999 (Ex. RW1/A) in support of their plea of abandonment. It cannot be sustained in any sense.

19. Since it is admitted that the petitioner had sustained injuries during course of employment, it is indeed true that the absence of the petitioner was caused by an accident arising out and in the course of employment. It was to be counted as continuous service as per the requirement of the provisions of Section 25-B of the Act. In that sense of the matter before terminating the petitioner the respondent had to resort the provisions of Section 25-F of the Act. More particularly because the absence from duty is not covered by any of the exceptions enumerated in sub clause a, b, bb, c of the Section 2 (oo) of the Act. That being so, at best absence simplicitor could have been held to be misconduct. The termination of services of the employee on the ground of misconduct cannot be resorted to without holding inquiry or complying with the provisions of Act. The termination of services of the employee on the ground of the absence thus amounts to retrenchment and the employer is under a legal obligation to follow the procedure prescribed under Section 25-F of the Act. The respondent has failed to do so.

20. The termination of the petitioner thus is in violation of the provisions of the Section 25-F of the Act.

21. The petitioner while appearing as PW1 has discharged his initial onus by deposing that he tried his best to secure employment elsewhere, but in vain and he is unemployed till date. No evidence contrary has been placed on record by the respondent. Not only this the conduct of the respondent management in denying the statutory rights to the petitioner in furtherance to the accident sustained by him during course of employment by not even tendering the compensation as visualized by the Workman Compensation Act, I deem it just and proper to award full back-wages to the petitioner from the date of his illegal termination.

22. The issues are decided accordingly in favour of the petitioner.

ISSUE NO. 3

23. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

24. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with full backwages with continuity in service and seniority from the date of his termination. The reference is answered accordingly. A copy of this award

be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 3rd day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 52/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Gurdev Singh S/o Shri Ram Singh, R/o Village Ratkehal, P.O. Sajao Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Gurdev Singh S/o Shri Ram Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on June, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP 2. Whether the petition is not maintainable, as alleged. . OPR
3. Whether the petition suffers from the vice of delay and laches. . OPR
4. Whether the petitioner is guilty of suppressio veri. . OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . OPR
6. Relief. . OPR

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time

being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads: “25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on June, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same. 27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was

considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 723/07-10077, dated 8.12.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 257/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Hans Raj S/o Shri Chhiteru Ram, R/o Village Baral, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Hans Raj S/o Shri Chhiteru Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 11.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been

indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
 - (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other

workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads: “25B. *Definition of continuous service.* For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 11.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record

lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with. 25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 855/07-586, dated 6.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court

under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 50/2005
Date of Institution : 16-3-2005
Date of decision : 30-6-2010

Sh. Hukam Chand s/o Sh. Kahan Singh r/o Village Karnehara, P.O. Galma, Tehsil Sadar, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, (Additional Superintending Engineer) HPSEB(E) Division Sundernagar, District Mandi, H.P.
....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Jitender Thakur, adv.
For the Respondent : Sh. Tarun Pathak, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Hukam Chand s/o Sh. Kahan Singh, workman by the Executive Engineer (Additional Superintending Engineer)HPSEB, Electrical, Division, Sundernagar,

Distt. Mandi, H.P. w.e.f. 30-11-1997 without complying the provisions of the Industrial Dispute Act, 1947 and certified Standing Orders of the board, when junior to him are retained by the board is proper and justified? If not, what relief of service benefits and compensation the above aggrieved workman is entitled to?"

2. The case set up by the petitioner in the statement of claim is that he was appointed as a beldar by the respondent board in Electrical Division Sunder Nagar, District Mandi on 5-7-1993. He was allowed to work continuously as such till April 1998. The petitioner was however given fictional breaks in between and as such was never allowed to complete 240 days in any of the years.

3. The work and conduct of the petitioner have been above board and nothing adverse was found against the petitioner during his service. He was further arbitrary and illegally terminated on 30-11-1997 orally. The said act of the respondent was stated to be violative of the provision of Section 25-F of the Act (hereinafter to be referred as the Act) and 14 (2) of the Standing orders applicable to the HPSEB.

4. It is further the case of the petitioner that the respondent had retained persons juniors to him while ordering his termination, namely Sita Ram, Ganga Ram, Tek Chand, Prakash Chand, Govind Ram, Amer Singh . The respondent thus was stated to have not followed the principle of "Last Come First Go" and as such the termination was bad , being violative of even section 25-G of the Act. The petitioner thus sought his reinstatement with all consequential benefit.

5. While disputing the averment of the petitioner the respondent inter-alia raised the preliminary objection of the claim being barred by limitation, it being not maintainable and the petitioner having suppressed material facts from the Court. However on merit it is the case of the respondent that the petitioner was engaged as a dailywaged beldar w.e.f. 5-7-1993 to April 1998 with certain breaks and interruption . He never completed 240 days in any calendar year. No juniors to the petitioner are alleged to have been engaged. Only those who had completed 240 days in a calendar year were engaged by the field staff. Moreover in the event of the continuous absence of the persons the field unit had taken work from the available persons. Moreover, that the daily rated beldars are retained subject to availability of funds and work and for specific work.

6. While filing the rejoinder the petitioner controverted the averments in the reply and further reiterated those in the statement of claim.

7. I notice that the following issues come to be framed on 27-9- 2005 by my Ld. Predecessor.

1. Whether the services of the petitioner were terminated by the respondent w.e.f. 30-11-1997, without complying the provisions of Industrial Disputes Act, and standing orders in an improper and unjustified manner?

...OPP.

2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled to?

....OPP.

3. Whether the petition is barred by limitation?

...OPR.

4. Whether the petitioner is not entitled to maintain the present petition as alleged?

.... OPR

5. Whether the petitioner has not approached the court, as alleged?

... OPR.

6. Whether the services of the petitioner were dis-engaged due to non-availability of funds and work and on completion of work for which he was engaged?

...OPR.

7. Relief.

8. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1	Yes
Issue No.2	Yes
Issue No.3	No
Issue No.4	Yes
Issue No.5	No
Issue No.6	No
Issue No.7	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS**ISSUE No. 1, 2 & 6**

9. All the three issues are being taken up together for discussion as they are co-related and intermingled:

10. The short and simple case set up by the petitioner is that his termination w.e.f. 30-11-1997 is violative of the provision of the Act, more particularly 25-F and 25-G and of the standing order framed by the respondent board. The respondent is further stated to have retained persons juniors to the petitioner while terminating his services and had thereby violated section 25-G of the Act. On the contrary it is pleaded by the respondent that the petitioner had never completed 240 days in any calendar year and had rather abandoned the job on his own. He was never terminated and as such the violation of the section 25-F or the standing orders does not arise. As far as the principle of "Last Come First Go" is concerned there is no categorical denial by the respondent in this behalf. In generalized terms the said fact is rather admitted by the respondent.

11. The petitioner while appearing as his own witness has reiterated the fact that his service were dispensed with illegally while retaining his juniors and that too by allowing them to complete 240 days in each calendar year. The petitioner in his cross-examination has further admitted that the respondents have retained a few persons namely Rakesh Kumar, Amar Singh, Ganga Ram, Tek Chand, Prakash Chand Prem Singh s/o Sh. Besar, Prem Singh s/o Latoia Ram etc. who were junior to him.

12. On the contrary there is no specific plea that the appointment of the petitioner was for a specific project or a term though in generalized terms it is stated there in that dailywaged beldar were retained subject to availability of work / funds against specific schemes and on completion of the scheme there services used to come to an end automatically. The respondents witness RW1 Sh. Narender Kumar Thakur, Assistant Engineer Electrical Sub-Division HPSEB, Slapper though also has stated that dailywaged beldar was always retained subject to availability of work and fund against specific scheme but there is not evidence in his behalf led by the respondent to remotely show so. He has further deposed that the petitioner had left the job on his own in August 1998. Apart from his bald assertion there is nothing on record to substantiate the same. Admittedly per him no show cause notice or letter was issued to the petitioner to explain his willful absence. In fact the witness (RW1) was posted in Slapper Sub-Division on 2-4-2008. He has no personal knowledge about the petitioner having abandoned the job nor any documentary evidence had been placed on record in this behalf. As far as the invocation of the Principle of "Last Come First Go" is concerned the witness does not no anything about the same.

13. Apart from the placing on record the mandays chart of the petitioner the seniority list have been placed on record vide Ex. PW1/B the continuance of juniors by the respondent. During the course of arguments I had the occasion of going through the record and as per seniority list (as it stood on 30-1-2000), last person was employed by the respondent on 10.6.1998. It has not been categorically denied that the persons named in para (3) of the statement of claim were not junior to the petitioner.

14. Seeing to the mandays chart, no doubt the petitioner had not completed 240 days in the preceding 12 months of his termination and as such the provision of Section 25-F may not come to the rescue of the petitioner. However, it is no more than apparent that the respondent had failed to prove the plea of abandonment. There is nothing on record that the petitioner had abandoned the job after 30-11-1997. The disengagement of the petitioner thus has to come within the ambit of "retrenchment". That being so, the respondent was duty bound to have followed the provisions of Section 25-G of the Act. It was not done in the present case. Moreover, it may be noticed at this juncture that the requirements of 240 days is not a condition precedent for the applicability of Section 25-G. Even if the workman has not completed 240 days, he will be entitled to the protection of the section 25-G and 25-H. Thus the petitioner in any case was entitled to the aforesaid protection. While terminating the petitioner the respondent thus had to retrench the last persons to be engaged. It was admittedly not done in the present case. Not only this, in fact the respondent has engaged a fresh hand as far back as 10.6.1998. While resorting to retrenchment it was this person who had to go first of all. Thus the respondent had violated the provisions of section 25-G and as such action of the respondent is unsustainable in the eyes of law. Moreover the plea of abandonment sought to be raised has been substantiated in any way, as is clear from the discussion held hereinabove.

15. For all the reason discussed above the petitioner is liable to be reengaged. It is however noticed from record that the petitioner had been absenting himself continuously for a period of about two and half years between the year 1995-97. Though he has averred that the respondent had given fictional breaks to him but there is no conclusive evidence to hold so. More so, it could not be believed that the respondent would have given fictional breaks for years at a stretch. The petitioner has also not discharge his initially onus of proving that he was not gainfully employed after his termination. Thereafter in the peculiar circumstances the petitioner is not held entitled to seniority and backwages.

16. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 4 & 5.

17. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the relief the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent

Issue No.3

18. The materials on record are indicative of the petitioner having approached the respondent from time to time after his retrenchment and requested for his re-engagement but of no avail. Left with no option, he later raised an industrial dispute which came to be referred to this Court for adjudication under Section 10(1) of the Act, vide Notification No.11- 1/8(Lab) I.D./05-Sunder Nagar dated 4Mar. 2005

19. In Divisional Manager, HPFC & another Vs. Garibu Ram, latest HLJ 2007 (HP) 1160, the delay of more than 10 years was held to have not come in the way of the workman whose services were illegally terminated. Having the surveyed various rulings on the point, the Hon'ble High Court of Himachal Pradesh inter alia observed:

“ While taking note of the entire case law with regard to the delay and laches, this Court consistently has held that the provisions of the Limitation Act would not apply but, however, depending upon the facts and circumstances of each case, the principle of delay and laches have to be seen and applied. A delay of even 14 years has been held not to come in the way of the poor man, whose services have been illegally terminated in claiming his relief under the provisions of the Industrial Disputes Act. In Deepa Ram's case (supra), there was a delay of 12 years. In Ramesh Chand's case (supra) there was a delay of 9 years. In Mohinder Kumar's case (supra), there was a delay of 14 years.....”

20. The petitioner, who is undeniably poverty-stricken, is stated to be illiterate. In view of the facts and circumstances of this case, the principle of delay and laches cannot be held applicable to his case. The issue under discussion is therefore held in his favour and against the respondent.

RELIEF

21. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 30-11-1997 is set aside and quashed. He is directed to be reengaged forthwith. The petitioner shall however not be entitled to seniority or back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 30th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 50/2005
Date of Institution : 16-3-2005
Date of decision : 30-6-2010

Sh. Hukam Chand s/o Sh. Kahan Singh r/o Village Karnehara, P.O. Galma, Tehsil Sadar, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, (Additional Superintending Engineer) HPSEB(E) Division Sundernagar, District Mandi, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Jitender Thakur, adv.

For the Respondent : Sh. Tarun Pathak, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Hukam Chand s/o Sh. Kahan Singh, workman by the Executive Engineer (Additional Superintending Engineer)HPSEB, Electrical, Division, Sundernagar, Distt. Mandi, H.P. w.e.f. 30-11-1997 without complying the provisions of the Industrial Dispute Act, 1947 and certified Standing Orders of the board, when junior to him are retained by the board is proper and justified? If not, what relief of service benefits and compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was appointed as a beldar by the respondent board in Electrical Division Sunder Nagar, District Mandi on 5-7-1993. He was allowed to work continuously as such till April 1998. The petitioner was however given fictional breaks in between and as such was never allowed to complete 240 days in any of the years.

3. The work and conduct of the petitioner have been above board and nothing adverse was found against the petitioner during his service. He was further arbitrary and illegally terminated on 30-11-1997 orally. The said act of the respondent was stated to be violative of the provision of Section 25-F of the Act (hereinafter to be referred as the Act) and 14 (2) of the Standing orders applicable to the HPSEB.

4. It is further the case of the petitioner that the respondent had retained persons juniors to him while ordering his termination, namely Sita Ram, Ganga Ram, Tek Chand, Prakash Chand, Govind Ram, Amer Singh. The respondent thus was stated to have not followed the principle of “ Last Come First Go” and as such the termination was bad , being violative of even section 25-G of the Act. The petitioner thus sought his reinstatement with all consequential benefit.

5. While disputing the averment of the petitioner the respondent inter-alia raised the preliminary objection of the claim being barred by limitation, it being not maintainable and the petitioner having suppressed material facts from the Court. However on merit it is the case of the respondent that the petitioner was engaged as a dailywaged beldar w.e.f. 5-7-1993 to April 1998 with certain breaks and interruption. He never completed 240 days in any calendar year. No juniors to the petitioner are alleged to have been engaged. Only those who had completed 240 days in a calendar year were engaged by the field staff. Moreover in the event of the continuous absence of the persons the field unit had taken work from the available persons. Moreover, that the daily rated beldars are retained subject to availability of funds and work and for specific work.

6. While filing the rejoinder the petitioner controverted the averments in the reply and further reiterated those in the statement of claim. 7. I notice that the following issues come to be framed on 27-9-2005 by my Ld. Predecessor.

1. Whether the services of the petitioner were terminated by the respondent w.e.f. 30-11-1997, without complying the provisions of Industrial Disputes Act, and standing orders in an improper and unjustified manner? ...OPP.
2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled to?OPP.
3. Whether the petition is barred by limitation? ...OPR.
14. Whether the petitioner is not entitled to maintain the present petition as alleged? OPR
5. Whether the petitioner has not approached the court, as alleged? ... OPR.
16. Whether the services of the petitioner were dis-engaged due to non-availability of funds and work and on completion of work for which he was engaged? ...OPR.
17. Relief.

8. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1 Yes

Issue No.2	Yes
Issue No.3	No
Issue No.4	Yes
Issue No.5	No
Issue No.6	No
Issue No.7	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE No. 1, 2 & 6.

9. All the three issues are being taken up together for discussion as they are co-related and intermingled:

10. The short and simple case set up by the petitioner is that his termination w.e.f. 30-11-1997 is violative of the provision of the Act, more particularly 25-F and 25-G and of the standing order framed by the respondent board. The respondent is further stated to have retained persons juniors to the petitioner while terminating his services and had thereby violated section 25-G of the Act. On the contrary it is pleaded by the respondent that the petitioner had never completed 240 days in any calendar year and had rather abandoned the job on his own. He was never terminated and as such the violation of the section 25-F or the standing orders does not arise. As far as the principle of "Last Come First Go" is concerned there is no categorical denial by the respondent in this behalf. In generalized terms the said fact is rather admitted by the respondent.

11. The petitioner while appearing as his own witness has reiterated the fact that his service were dispensed with illegally while retaining his juniors and that too by allowing them to complete 240 days in each calendar year. The petitioner in his cross-examination has further admitted that the respondents have retained a few persons namely Rakesh Kumar, Amar Singh, Ganga Ram, Tek Chand, Prakash Chand Prem Singh s/o Sh. Besar, Prem Singh s/o Latoia Ram etc. who were junior to him.

12. On the contrary there is no specific plea that the appointment of the petitioner was for a specific project or a term though in generalized terms it is stated there in that dailywaged beldar were retained subject to availability of work / funds against specific schemes and on completion of the scheme there services used to come to an end automatically. The respondents witness RW1 Sh. Narender Kumar Thakur, Assistant Engineer Electrical Sub-Division HPSEB, Slapper though also has stated that dailywaged beldar was always retained subject to availability of work and fund against specific scheme but there is not evidence in his behalf led by the respondent to remotely show so. He has further deposed that the petitioner had left the job on his own in August 1998. Apart from his bald assertion there is nothing on record to substantiate the same. Admittedly per him no show cause notice or letter was issued to the petitioner to explain his willful absence. In fact the witness (RW1) was posted in Slapper Sub- Division on 2-4-2008. He has no personal knowledge about the petitioner having abandoned the job nor any documentary evidence had been placed on record in this behalf. As far as the invocation of the Principle of "Last Come First Go" is concerned the witness does not no anything about the same.

13. Apart from the placing on record the mandays chart of the petitioner the seniority list have been placed on record vide Ex. PW1/B the continuance of juniors by the respondent. During the course of arguments I had the occasion of going through the record and as per seniority list (as it stood on 30-1-2000), last person was employed by the respondent on 10.6.1998. It has not been categorically denied that the persons named in para (3) of the statement of claim were not junior to the petitioner.

14. Seeing to the mandays chart, no doubt the petitioner had not completed 240 days in the preceding 12 months of his termination and as such the provision of Section 25-F may not come to the rescue of the petitioner. However, it is no more than apparent that the respondent had failed to prove the plea of abandonment. There is nothing on record that the petitioner had abandoned the job after 30-11-1997. The disengagement of the petitioner thus has to come within the ambit of "retrenchment". That being so, the respondent was duty bound to have followed the provisions of Section 25-G of the Act. It was not done in the present case. Moreover, it may be noticed at this juncture that the requirements of 240 days is not a condition precedent for the applicability of Section 25-G. Even if the workman has not completed 240 days, he will be entitled to the protection of the section 25-G and 25-H. Thus the petitioner in any case was entitled to the aforesaid protection. While terminating the petitioner the respondent thus had to retrench the last persons to be engaged. It was admittedly not done in the present case. Not only this, in fact the respondent has engaged a fresh hand as far back as 10.6.1998. While resorting to retrenchment it was this person who had to go first of all. Thus the respondent had violated the provisions of section 25-G and as such action of the respondent is unsustainable in the eyes of law. Moreover the plea of abandonment sought to be raised has been substantiated in any way, as is clear from the discussion held hereinabove.

15. For all the reason discussed above the petitioner is liable to be reengaged. It is however noticed from record that the petitioner had been absenting himself continuously for a period of about two and half years between the year 1995-97. Though he has averred that the respondent had given fictional breaks to him but there is no conclusive evidence to hold so. More so, it could not be believed that the respondent would have given fictional breaks for years at a stretch. The petitioner has also not discharge his initially onus of proving that he was not gainfully employed after his termination. Thereafter in the peculiar circumstances the petitioner is not held entitled to seniority and backwages.

16. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 4 & 5

17. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the relief the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent

Issue No.3

18. The materials on record are indicative of the petitioner having approached the respondent from time to time after his retrenchment and requested for his re-engagement but of no avail. Left with no option, he later raised an industrial dispute which came to be referred to this Court for adjudication under Section 10(1) of the Act, vide Notification No.11-1/8(Lab) I.D./05-Sunder Nagar dated 4Mar. 2005

19. In Divisional Manager, HPFC & another Vs. Garibu Ram, latest HLJ 2007 (HP) 1160, the delay of more than 10 years was held to have not come in the way of the workman whose services were illegally terminated. Having the surveyed various rulings on the point, the Hon'ble High Court of Himachal Pradesh inter alia observed:

“ While taking note of the entire case law with regard to the delay and laches, this Court consistently has held that the provisions of the Limitation Act would not apply but, however, depending upon the facts and circumstances of each case, the principle of delay and laches have to be seen and applied. A delay of even 14 years has been held not to come in the way of the poor man, whose services have been illegally terminated in claiming his relief under the provisions of the Industrial Disputes Act. In Deepa Ram's case (supra), there was a delay of 12 years. In Ramesh Chand's case (supra) there was a delay of 9 years. In Mohinder Kumar's case (supra), there was a delay of 14 years.....”

20. The petitioner, who is undeniably poverty-stricken, is stated to be illiterate. In view of the facts and circumstances of this case, the principle of delay and laches cannot be held applicable to his case. The issue under discussion is therefore held in his favour and against the respondent.

RELIEF

21. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 30-11-1997 is set aside and quashed. He is directed to be reengaged forthwith. The petitioner shall however not be entitled to seniority or back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 30th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala, H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 282/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Inder Pal S/o Shri Kanshi Ram, R/o Village Dhanrashi, P.O. Sandhote, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Inder Pal S/o Shri Kanshi Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 7.8.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to

4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? . . .OPP
2. Whether the petition is not maintainable, as alleged. . .OPR
3. Whether the petition suffers from the vice of delay and laches. . .OPR
4. Whether the petitioner is guilty of suppressio veri. . .OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. . .OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
Issue 2 :	No
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO.1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
 - (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
- but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other

workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 7.8.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1282/07-282 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11- 23/84(Lab)1D/2008-Mandi dated March 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 65/2005

Instituted on : 18.5.2005

Decided on: : 27.4.2010.

Shri Jagdish Chand S/o Shri Durga Ram, P.O. Janjavi, District Bilaspur, H.P.

.....Petitioner

Vs

The Divisional Forest Officer, Forest Division, Bilaspur, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Shri Jagdish Chand s/o Shri Durga Ram, Ex. daily wages beldar by the Divisional Forest Officer, Forest Division, Bilaspur w.e.f. 1.9.1999 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and compensation the above aggrieved workman is entitled to?”

2. The case of the petitioner, as emerging from the statement of claim is that he was appointed as a daily waged beldar by the respondent in forest range Kloal on 21.7.1987. He continued to work as such upto 31.8.1999. His services came to be verbally dispensed with on 1.9.1999.

3. Apart from alleging that his termination was illegal, being against the mandate of the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act), the respondent has not maintained any seniority. They have retained his juniors namely Shri Banshi Ram, Lachman Dass, Gain Chand, Jammal Deen, Pritam Chand, Krishan Chand, Parveen Kumar and Sunder Ram. The said act of the respondent was stated to be in gross violation of the provisions of Section 25G and the settled principle of ‘First Come, Last Go’. The petitioner has thus sought that he be reinstated along with full back-wages.

4. While contesting the claim, the respondent has admitted that the petitioner was employed in Kloal range w.e.f. June, 1989. He continued as such upto August, 1999. As per the respondent the applicant had completed 240 days only during the year 1993, 1995 and 1997. Further, per the respondent, the petitioner had abandoned work in October, 1998. He again started working in April, 1999 and eventually left the job on 31.8.1999. The petitioner having left work in the year 1998, he could not complete 240 days and thereby lost his seniority too.

5. No rejoinder was filed during the course of the proceedings.

6. On the basis of the pleadings on record my Ld. Predecessor framed the following issues for determination:

1. Whether the termination of the services of the petitioner by the respondent w.e.f. 1.9.1999 without complying the provisions of Industrial Disputes Act in an illegal and unjustified manner, as alleged?

. .OPP

2. If issue no.1 is proved in affirmative to what service benefits the petitioner is entitled to?

. .OPP

3. Whether the petitioner has left the job at his own after 31.8.1999 as alleged?

. .OPR

4. Relief.

7. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS

ISSUES NO . 1, 2 and 3

8. All the issues are clubbed together as the three are closely intermingled and required to be discussed together.

9. At the outset it would be relevant to point out that the services of the petitioner as per his own allegation came to be terminated on 31.8.1999. The mandays chart placed on record which has been proved and placed by the petitioner as Ex. PA-1. As is apparently seen and further corroborated by the deposition of Pushpinder Rana (RW1) Divisional Forest Officer, Bilaspur it indisputably comes to the fore that the petitioner has not completed 240 days in the 12 calendar months preceding his termination. The petitioner has completed only 156 days between October, 1998 and August, 1999. It cannot thus be said that the petitioner had completed 240 days in a calendar year preceding his termination and as such the rigors of the provisions of Section 25F may not be applicable in the case of the petitioner.

10. The other aspect on which the petitioner has laid much stress is that the respondent has retained his juniors and as such the action was against the provisions of Section 25-G of the Act. The petitioner has also stated that the certain junior have been retained by the respondent. In paragraph 3 of the statement of claim the petitioner mentioned the names of many beldars who was stated to be junior to him. There is no categorical denial by the respondent as far as this aspect of the matter is concerned. Though admitted facts need not be proved but nonetheless the perusal of the evidence on record also shows that even the Divisional Forest Officer, Bilaspur, who is examined as RW1 has nowhere denied that the juniors were not retained by the respondent. The perusal of the seniority list of daily wagers existing in the division as placed on record vide Ex. PA-1 shows that after 1989 the junior persons have been

employed by the department. So much so even beldars were employed by the department in the year 1999 and 2004. That being so the respondent had violated not only the provisions of the Section 25-G of, but also the provisions of Section 25-H of the Act which inter alia lays an obligation on the employer to re-engage workers strictly as per seniority. It is by now well settled that Section 25-H is applicable to all retrenched workman and not only to those covered by Section 25-F of the Act.

11. It is also pleaded by the respondent that the petitioner had abandoned the job of his own will. There is nothing on record to remotely show that the petitioner had abandoned the job. Had it been so the respondent would have atleast issued some show cause notice to the petitioner that he was willful absenting from the job. Nothing has been proved in this context, except bald statement of RW1. The said plea is also thus not sustainable as "absence" simpliciter by itself cannot be equated with abandonment. Termination of the services of an employee on the ground of absence from duty amounts to retrenchment and the employer would be under a legal obligation to follow the procedure prescribed under section 25-F. There is no evidence regarding abandonment on record.

12. Thus it cannot be said that the petitioner had abandoned the job w.e.f. 31.8.1999. The services of the petitioner was done away by the respondent in gross violation of the provisions of Section 25-G of the Act and as such was illegal, arbitrary, and unjust. Not only this action of the respondent in not re-engaging the petitioner, even while offering fresh appointment to the new beldars was also in violation of the provisions of Section 25-H of the Act and as such not legally sustainable in the eyes of law.

13. The action of the respondent is thus liable to be quashed and set aside. It is ordered accordingly. The petitioner shall be reinstated in service. He shall entitle to all consequential benefits including continuity of service and seniority, except the backwages. There is no whisper in the deposition of the petitioner that he was not gainfully employed after his retrenchment as such he is not entitled to any back-wages.

RELIEF

14. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed being in violation to the provisions of Sections 25-G and 25-H of the Act. He is ordered to be reinstated with all consequential benefits, except back-wages. The respondent shall reinstate the petitioner within 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room.

Announced in the open Court today the 27th day of April 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. LABOUR COURT,
DHARAMSHALA (H.P.)**

Ref. No. : 58/06
Instituted on : 20.3.2006
Decided on: : 27.4.2010.

Shri Jai Ram S/o Shri Jagga Ram & Others (10) workmen C/o General Secretary, I&PH and HPPWD Workers Union, House No.100/3, Roura Sector No.2, Bilaspur, H.P.

.....Petitioners

Vs

The Superintending Engineer, HPPWD, 10th Circle, Bilaspur, District Bilaspur, H.P. Reference under section 10 of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.
For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Sh. Jai Ram s/o Sh. Jagga ram and others(10) workmen (list of workmen enclosed) by the superintending Engineer, HPPWD 10th circle, Bilaspur, Distt. Bilaspur, H.P. w.e.f. 01-06-2000 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workmen are entitled to? ”

2. The case of the petitioners as it emerges from their statement of claim is that all the workmen were working as daily waged beldars since 1998 with the respondent and were employed in division no. 2. They continued to work with the respondent till 31.5.2000. Their services were dispensed with by the respondent with effect from 1.6.2000 orally, without any rhyme or reason and without any notice. They were not issued any muster rolls thereafter. They raised their dispute before the Labour officer Mandi zone for conciliation, pursuant to which the matter has been finally referred to this court.

3. It is further the case of the petitioners that during the course of conciliation the respondent had taken back 4 petitioners to work in the year 2001 namely Sesh Ram, (Pet. No 4) Pyare Lal (pet. no 5), Chet Ram (pet no. 8) and Pyare Lal (pet. No.10). One petitioner Surinder Kumar has since died on 29.10.2003.

4. The petitioners also allege that the respondent while terminating the services of the petitioners have not followed the provisions of Sec. 25 –G of the Industrial Disputes Act, that the workmen who was the last to be employed shall be retrenched first of all and that the juniors of the petitioners have been retained by the respondent namely Sesh Ram, Bhuru Ram, Harbans Lal, Shyam Lal, Sukh Ram, Rajesh Kumar, Resha, Balak Ram, Sanjay Kumar, Madan Lal, Yog Raj, Jagat Pal etc. The action of the respondent was alleged to be in contravention of the provisions of Section 25-G, 25F, 25H and 25N. The respondents have given fictional breaks to the petitioners to deprive them of the benefits of the Act. They, thus claim re-instatement with all consequential relief including back wages.

5. While contesting the claim the respondent avers that the petitioners were appointed as daily wagers in Div. no 1 in 1998, but they were appointed to undertake emergent and seasonal work. They were appointed for specific work and as such were removed after the completion of the specific project and for want of funds.

6. It is admitted by the respondents that 4 of the petitioners namely Sesh Ram, Pyare Lal, Chet ram and Pyare Lal were continuing with the department. Per the respondent, they were senior to the other petitioners. The four were stated to be working in the National highway division Pandoh and had completed 240 days. The petitioner Sesh Ram was stated to have worked with the department for the years 1998, 1999, 2000 and 2001 for a period of 23,241,184 and 28 days respectively, Pyare Lal s/o Hari Ram had likewise worked for the year 1999, 2000 and 2001 for a period of 246,181 and 27 days respectively. Chet ram s/o Jagga Ram had worked for the years 1999, 2000 and 2001 for a period of 246,182 and 28 days respectively. Pyare Lal s/o Krishnu Ram one of the other petitioners had worked for the year 1998, 1999, 2000 and 2001 for a period of 276,228,180 and 26 days.

7. The respondents denied that the workmen referred in para three of the claim were employed after the petitioners. They were stated to have been employed at the same time. The petitioners had themselves abandoned their job. It was denied that the petitioners had been given fictional breaks or their action was against the provisions of the Industrial Disputes Act.

8. While filling rejoinder the petitioners controverted the averments in the reply and reiterated those of the statement of claim.

9. These simple, short and straight pleadings gave rise to the following issues, which came to be framed by my Ld. Predecessor on 2.8.2007:

1. Whether the disengagement from the service of the claimant by the respondent is legal and justified?
..... OPR
2. If the above issue is proved in the affirmative to what relief of service benefit the petitioner is entitled to?
..... OPP
3. Whether the reference comprises a stale claim? If so, its effect
..... OPR
4. Relief

10. Both the parties led oral and documentary evidence in support of their respective claims. On the basis of their averments, pleadings, proof and other attendant material placed on record the issue wise findings may be set out as below :-

REASONS FOR FINDINGS**ISSUES NO. 1 & 2**

11. Though the issue should have been as to whether the termination of the petitioners was illegal and unjustified, but the same has been framed in the negative and as such its purpose and import remains the same. As such I do not intend to reframe the issue at this belated stage.

12. The respondents in order to countenance its averment that its action was just and legal has averred that the petitioners had been appointed to work in emergent situations and in furtherance of seasonal work. They were appointed against a specific work and after the completion of the same and for want of funds their services were dispensed with. Out of the four workmen who had been re employed the other petitioners had not completed 240 days in any year.

13. It further transpires from record that 4 workmen, namely Sesh Ram, Pyare Lal, Chet Ram and Pyare Lal had already been re engaged by the respondent. Qua them the reference does not survive. One of them Surinder Kumar has since expired on 29.10.2003. The reference is thus required to be answered in respect of the remaining 7 workmen as no evidence has been led to further the cause of deceased Surinder Kumar.

14. Since the issues have been framed in the negative, I propose to discuss the evidence led by the respondent first. The respondent has examined Pawan kumar Sharma, Executive Engineer HPPWD, Div. No. 1, Bilaspur as RW-1. He has deposed that the petitioners had been employed in his division in the year 1998 for emergent, seasonal and specific work. On completion of work their services had been dispensed with. Their services were also temporarily stopped for want of funds. The workmen named by the petitioners in the statement of claim who had been retained by the department were senior to the petitioners. The workmen who had completed 240 days had been re-engaged. The petitioners had not completed 240 days in any year. They used to come for work as per their sweet will and leave job as per their own will. The department had not issued any show cause notice to the petitioners.

15. The Executive Engineer also placed on record the mandays chart prepared on the basis of the original muster rolls as Ex. RW 1/A.

16. On the contrary all the seven petitioners filed their affidavits by way of evidence as Ex. PW -1/A to Ex PW-7/A. They have exhibited along with their working days charts as Ex. PW-1/B to Ex. PW-7/B respectively, demand letter dated 12.6.2000 vide Ex. Pw-1/C to Ex PW-7/C, the transfer order of the 4 re-engaged workmen dated 17.6.2004 Ex Pw-1/D to Ex PW-7/D and their working days as issued by the department vide Ex. PW-1/E to PW-7/E.

17. All the petitioners in unison have deposed that they were appointed as beldars in the year 1998-99 and continued to work as such till 31.5.2000, when their services were terminated orally, without any basis and issuing notices. They had raised an industrial dispute before the Labour officer on 12.6.2000. Four of the petitioners had been re engaged by the department. On 19.6.2004 and transferred to N.H. Sub – division Pandoh. They had completed 240 days in the preceding twelve months of their alleged termination. The juniors as mentioned in para no 3 of the statement of claim had been retained by the respondent which was in violation of the principle of first come and last go.

18. The mandays chart placed on record by the respondent as RW-1/A and Ex-PW -1/E to Ex PW-7/E are the same. Apparently parties are not in dispute over the mandays of the petitioners. The same can conveniently be made the basis to find out whether the petitioners had completed 240 days in the preceding 12 months of their termination, which is the basic test to come to the conclusion whether the termination was violative of the provisions of Sec. 25-F of the Industrial Disputes Act. It is fairly admitted by the Executive Engineer while appearing as RW-1 that no notice whatsoever was issued to the petitioners, whether under the provisions of sec. 25-F or of abandonment, as is the alleged case of the respondent.

19. The case of the respondent that the petitioners were employed only in emergent situations, for seasonal work and for specific projects is fraught with serious doubts. Though RW-1 has also testified on similar lines but there is no documentary evidence placed on record by the respondent. On the contrary Ex RW-1/A also falsifies the stand of the department. As per the said mandays Chart (RW-1/A) the petitioners have been shown to be working continuously right from inception of their respective appointments till their termination on 1.6.2000. It cannot thus be believed that the petitioners were seasonal workers or were appointed in emergent situations alone. There is nothing on record to remotely suggest that they were appointed to a specific project. Neither is their appointment on such terms nor is there any notice that their services are put to rest on completion of the project.

20. The respondent has also very faintly and half heartedly tried to portray that the petitioners had abandoned their job, but again there is nothing to remotely prove the same. Admittedly no notices were served on the

petitioners, be it in furtherance of Sec. 25-F or abandonment. Moreover the perusal of RW-1/A shows that all the petitioners had worked with the department after June 2000. They were allowed to work on alternate months till January 2001. The plea of abandonment is thus not genuine. Not only this, had the petitioners abandoned the job the department might have atleast corresponded with the petitioners as to why they were not reporting to work. There is nothing of this sort on record, what to say of a notice which should have been issued to the petitioners on abandoning the job. The plea of abandonment thus seems to be fallacious and made just to deprive the petitioners of their lawful claim.

21. Now, adverting to the most important aspect on which hinges the entire fate of the case. That is, whether the petitioners had completed 240 days entailing the protection of Sec. 25-F to the petitioners. For had they completed the said period it was incumbent upon the respondent to have issued one months notice in writing indicating the reasons for retrenchment, or the workman has been paid in lieu thereof wages for the said period along with retrenchment compensation.

22. The respondent while denying that the petitioners had completed 240 days has forcefully pleaded and even tried to prove that the petitioners have not completed 240 days in any of the calendar years they worked with the department. The respondent has thus highlighted the working days of each workman year wise that is for the year 1998, 1999, 2000 and 2001. Even the Executive Engineer while appearing as RW-1 has deposed that none of the workmen have completed 240 days in any year.

23. The respondent probably was not aware of the requirements of the Act. The continuous service which is required to be reckoned as 240 days as per Sec. 25-B has to be computed during a period of twelve calendar months preceding the date with reference to which calculation is to be made. In the instant case the 240 days were to be calculated with respect to 12 months preceding 1.6.2000, i.e. the date of termination. It is by now well settled that while computing the period under sub section (2) of Sec 25-B, Sundays and national holidays should be taken into account.

24. Faced with this situation a look at the mandays chart of the petitioners (Ex-PW -1/E to Ex.PW-7/E and RW-1/A) shows that preceding twelve months of their termination the petitioners had completed 240 days un interrupted service. The petitioner Jai ram had completed 241 days, Shyam Lal 241 days, Satpal 243 days, Ramesh 241 days. No doubt the other petitioners namely Roshan Lal had completed 234 days, Ram Singh had completed 239 days and Sita Ram had completed 223 days but if the Sundays and national holidays including 2nd October and 26th January and 15th August is taken into consideration, which are otherwise liable to be taken into consideration while computing 240 days, all the 7 petitioners have completed 240 days, as required by the Act.

25. Admittedly no notice was issued to the petitioners by the respondent. Thus, the only conclusion which can be drawn is that the respondent failed to abide by the condition precedent to retrenchment as envisaged under Sec. 25-F of the Act and as such the action of the respondent is void and illegal. It cannot withstand legal scrutiny. The termination of the 7 workmen namely Jai Ram, Shyam Lal, Satpal, Ramesh, Roshan Lal, Ram Singh and Sita Ram is illegal and unlawful.

26. Not only this ,it is further apparent from Ex PW-1/C to EX PW-7/C, which have not been disputed by the respondent that all the petitioners were atleast senior to Chet Ram and Pyare Lal who were appointed as beldars on 12.1.1999. All the petitioners had been appointed prior to them. That being so they had to be retrenched prior to the petitioner and likewise while reengaging the retrenched workmen the petitioner had to be given preference above them. The act of the respondent was also in violation of the provisions of Sec 25-G and 25-H of the Industrial Disputes Act.

27. I am, thus constrained but to hold that the disengagement of the petitioner mentioned hereinabove was not legal and justified. The petitioners namely Jai Ram, Shyam Lal, Satpal, Ramesh, Roshan Lal, Ram Singh and Sita Ram are liable to be re instated. The petitioners have not led any evidence worth the name to show that they were not gainfully employed during this interregnum, therefore they are not entitled to back wages. Over and apart they shall be entitled to all consequential benefit including continuity and seniority. The issues are answered accordingly.

ISSUE NO 3

29. Neither anything was urged nor it was brought to my notice as to how the reference was stale. The perusal of record shows that the petitioners had raised an industrial dispute as far back as 12.6.2000 by approaching the Labour Officer-cum- Conciliation Officer, Bilaspur. The said fact is not disputed by the respondent. It cannot, therefore be said that the reference comprises a stale claim. The issue is thus decided against the respondents.

RELIEF

30. For all the reasons discussed above, I hold that the termination of the petitioners Jai Ram, Shyam Lal, Satpal, Ramesh, Roshan Lal, Ram Singh and Sita Ram is illegal being against the mandate of the provisions of the Industrial Disputes Act. As a sequel they are ordered to be reinstated with all consequential benefits that is continuity

and seniority in service, except back wages. The reference is answered accordingly. Let a copy of the award be sent for publication.

Announced in the open Court today the 27th day of April 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharmshala (H.P.).

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 293/2008
Instituted on : 13.6.2008
Decided on: : 1.5.2010

Shri Jai Singh S/o Shri Parma Ram R/o Village Kohan, P.O. Sajoopiplu, Tehsil Sarkaghat, District Mandi, H.P.Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Jai Singh S/o Shri Parma Ram by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 18.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work

is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be

recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

- (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 18.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the

provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred *"that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members...."* There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1723, dated 31.3.07. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated May 9, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 245/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Jameel Khan S/o Shri Roshan Khan, R/o village Baral, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 Sh. Vijay Kaundal, Adv.
 For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Jameel Khan S/o Shri Roshan Khan by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on May 5, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of

the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus

manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 5.5.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the

rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/06 & 853/07-585, dated 6.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated Feb. 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-

wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 299/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Jawala Ram S/o Shri Chhangu Ram, R/o Village Answai, P.O. Dharwasda, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Jawala Ram S/o Shri Chhangu Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 19.12.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such

retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an

accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 19.12.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no

cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1284/07-284 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 301/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Jayoti Ram S/o Shri Rana Ram, R/o Village Koon, P.O. Tour Khola, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Jayoti Ram S/o Shri Rana Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on February, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which

applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the

employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (i) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an

accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

- (ii) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (iii) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on February, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no

cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1157/07-807 dated 8.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 3, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
 CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 96/2006
Instituted on : 30.8.2006
Decided on : 29.6.2010

Shri Joginder Singh S/o Shri Punnu Ram, R/o Village & P.O. Thakurdwara, Tehsil Indora, District Kangra, H.P.Petitioner

Vs

1. The Managing Director, Himachal Pradesh Financial Corporation, New Himrus Building, Circular Road Shimla-1

2. The Assistant General Manager, H.P. Financial Corporation District Office Ram Nagar, Dharamshala, Distt. Kangra, H.P.

.....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Vinay Sharma, Adv.

For the Respondents : Sh. S.C. Vaid, Adv.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the termination of services of Shri Joginder Singh S/o Shri Punnu Ram workman by the (1) The Managing Director, Himachal Pradesh Financial Corporation, New Himrus Building, Circular Road Shimla-1 (2) The Assistant General Manager, H.P. Financial Corporation District Office Ram Nagar, Dharamshala, Distt. Kangra, H.P. w.e.f. 20.12.03 without complying the provisions of Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was engaged as workman/Chowkidar by the respondent on 10.11.1993. He was deployed to work in Kanchan Polythene Industry Khatiar. The petitioner continued working with the respondents continuously till 18.12.2003. His services were however discontinued on 19.12.2003 orally without any notice.

3. The petitioner had raised an industrial dispute on 19.1.2004 and hence the present reference.

4. The disengagement of the petitioner is stated to be illegal arbitrary and against the statutory provisions of the Industrial Disputes Act (hereinafter referred to as the Act). No notice as envisaged under Section 25-F of the Act was issued to the petitioner. The respondents even violated the principle of ‘last come first go’ provided under the provisions of Section 25-G of the Act. The termination of the petitioner was also stated to be violative under Section 25-N of the Act.

5. The disengagement of the petitioner on the basis of the terms/conditions of a contract dated 8.3.1995, which inter alia restricted the right of the petitioner in terms of the protection guaranteed to him under the Industrial Disputes Act was stated to be void in the eyes of law. The petitioner thus sought that the termination be declared null and void. He be reinstated along with all consequential benefits.

6. While contesting the claim of the petitioner the respondent inter alia raised the preliminary submissions that the termination of the petitioner did not fall within the ambit of “retrenchment” as the services of the petitioner had been engaged as a Chowkidar in pursuance to a contract and his engagement was co-terminus with the sale of the taken

over industrial unit under Section 29 of the State Financial Corporation Act, 1951. Moreover that the corporation does not have any regular vacancy of a Chowkidar engaged in taken over units and no rules and regulations have been framed to engage them on duties and as such the completion of 240 days of continuous service in a year cannot entitle them for regularization. The petitioner had been engaged in a taken over and a closed unit for watch and ward purposes. Therefore the petitioner cannot be deemed to be an employee/workman of the industrial concern. The status of employer and an employee inter se the parties were also disputed as the respondent corporation was only the owner of the assets of the company for a limited purposes under Section 29 of the State Financial Act, 1951.

7. On merits it is the case of the respondents that the petitioner was engaged purely on contract basis and his engagement was co-terminus to the sale of the taken over unit, where the petitioner had been appointed for watch and ward. The petitioner had himself agreed to abide by the terms of the contract and even executed an agreement in his behalf on 8.3.1995. Consequently the services of the petitioner were terminated on 18.12.2003 in view of the sale of the unit. The action of the respondents corporation was thus stated to be legal and valid. It was denied that the provisions of sections 25-F, 25-G and 25-N of the Act were applicable in the facts and circumstances of the case.

8. The respondents thus sought dismissal of the claim.

9. While filing rejoinder the contentions raised in the reply were denied and those in the statement of claim were reiterated by the petitioner.

10. I notice that on 7.1.2008 the following issues came to be framed by my ld. predecessor:

1. Whether the termination from the service of the petitioner by the respondent is proper and justified? OPP
2. If the above issue is proved in affirmative to what relief of service benefit the petitioner is entitled to the respondent? OPP
3. Whether the service of the claimant were engaged for a specific period of time and engaged for a specific work on whose completion his service stood automatically terminated. If so, its effect? OPR
4. Relief.

11. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue No.1 : Yes

Issue No.2 : As per operative part

Issue No.3 : Yes, but his services could not have been unilaterally terminated automatically.

Issue No.4 : Compensation awarded as per the operative part of the award.

REASONS FOR FINDINGS

ISSUES NO. 1, 2 and 3

12. All the three issues are being taken up together for discussion as they are co-related and intermingled.

13. The case of the petitioner is that he was illegally terminated, in gross violation of the provisions of the Industrial Disputes Act whereas on the contrary as per the respondents the petitioner had been appointed on contract basis with a specific understanding that his services shall come to an end when the unit in which he was engaged was sold to the intending purchaser under Section 29 of the State Financial Corporation Act, 1951.

14. It is not denied that the petitioner had been appointed as a Chowkidar w.e.f. 10.11.1993 till his termination on 18.12.2003. It is also not in dispute that the petitioner had completed "continuous service" i.e. having completed 240 days in each year with the respondents during his engagement. The only defence propounded by the respondents is that the petitioner had been engaged on daily wages on contract basis for looking after the ward and watch of a taken over unit and his services was coterminus with the sale of the said unit to its purchaser.

15. The controversy is thus relegated to a very narrow compass i.e. whether the termination of the petitioner in such a situation would amount to "retrenchment" as envisaged under the provisions of the Industrial Disputes Act or not. The respondents placed on record the contract whereby the petitioner had come to be engaged vide Ex. RW1/B. To countenance the said plea of the respondents the petitioner however has averred that the agreement/contract dated 8.3.1995 had been entered by way of misrepresentation. His signature has been obtained on blank papers by the respondent corporation. The corporation had incorporated stipulations detrimental to the right of the petitioner which were also arbitrary and opposed to public policy.

16. In order to further prove the case the petitioner appeared as his own witness as PW1. He reiterated the averments in the statement of claim and further deposed that the certain juniors to him have been regularized by the corporation. The petitioner has further deposed that his termination violated the provisions of Section 25-G and 25-H of the Act. The execution of the contract dated 8.3.1995 though was not disputed but it is deposed by the petitioner that his signatures had been obtained by the respondents on blank papers, by misrepresentation and fraud and these papers were subsequently used and manipulated to put him in a disadvantageous position and that the contract was void unconscionable and opposed to public policy.

17. The respondents on the other hand examined one Sh. K.C. Rana, Assistant General Manager, District Office of the Himachal Pradesh Financial Corporation, Dharamshala. He also deposed on the same lines as was averred in their reply. Per him the petitioner was engaged purely on contract basis at his own instances on 10.11.1993 for watch and ward of assets of M/s. Kanchan Polythene Industry, Kangra and it had been made clear to the petitioner that his service would be terminated as and when the unit on in which he is engaged is sold to the intending purchaser under Section 29 of the State Financial Corporation Act, 1951. He had agreed by the terms of the contract and had thereupon executed a contract on the said terms on 8.3.1995. The said agreement has been placed on record by the respondents as Ex. RW1/B. However per this witness the corporation has not framed any rules in respect of such employees. The engagement of the petitioner was stated to be co-terminus with this sale of the industrial unit in which he had been engaged.

18. Keeping in view the agreement dated 8.3.1995, Ex. RW1/B it is clear that the petitioner had been engaged for a specific purpose and his services had to come to an end automatically after the happening of the sale. It is not in dispute that the petitioner had been employed to work as a Chowkidar in Kanchan Polythene Industry. It was in furtherance of the watch and ward of the said unit which had been taken over by the respondent. The stipulation in the contract (Ex. RW1/B) was that in the event of the sale of the said unit to its purchaser the services would automatically come to an end. The said stipulation read with section 2(o) and (b) shows that the termination does not fall within the ambit of the term "retrenchment".

19. Though the Ld. counsel for the petitioner has urged with all vehemence that the act of terminating the services of the petitioner would squarely fall within the ambit of retrenchment and has also placed on record the details of the daily paid chowkidars engaged after 1993 till date in different parts of the State for the watch and ward of the units under the possession of the Corporation. It is further contended that the certain juniors have still being retained. The action of the respondent is also violative of the provisions of Section 25-G of the Industrial Disputes Act. A perusal of the details brought on record by the petitioner in relation to different districts show that invariably there is a date of engagement and date of disengagement of such workmen, except for certain cases pending in the Labour Court. However certain workmen who still continue working with the respondents corporation but it is because of the continuance of the appointment on the same terms. One Irshad Ahmed and Krishan Dutt are however shown to have been regularized in pursuance to the orders of the court. Again since the appointment of the petitioner was on contract and that too for a stipulated work, I am afraid no parity can be drawn between their seniors and juniors. There are certain instances where the taken over units have not been sold and the arrangement is still continuing. The Ld. counsel has further placed reliance upon the judgment of the Hon'ble Supreme Court titled as Central Bank of India vs. S. Satyam and Ors., 1996 5 SCC 419, Workmen of the Food Corporation of India vs. FCI, 1985 (2) SCC 136, Pramodh Jha and Ors. vs. State of Bihar and ors. 2003 (4) SCC 619, S.N. Nilajkar and Ors. vs. Telecom District Manager, Karnataka, 2003 (4) SCC 27. I am afraid the ratio of the aforesaid judgment except S.N. Nilajkar's case referred hereinabove supra are not applicable to the facts of the case. In Nilajkar's case discussed hereinabove supra though it has been held that the termination of a workman engaged in a scheme or project may not to retrenchment within the meaning of sub clause (b) but subject to terms and conditions, which have been enumerated thus (i) that the workman was employed in a project or scheme of temporary duration, (ii) the employment on contract and not as daily wage simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project, (iii) the employment came to an end simultaneously that the termination of the scheme or project on sustainably with the terms of contract and (iv) that the workman ought to have been apprised or made aware of the aforesaid terms by the employer and the placement of employment.

20. On the facts of the present case the contract Ex. RW1/B would result in a notice to the workman that his employment was for a particular purposes and was liable to be terminated on the unit being sold to the respective buyer. Thus the present case in fact does fall within the conditions required to be satisfied as per the dictum of the Hon'ble Supreme Court in Nilajkar's case to bring it outside scope of retrenchment. It thus would not come to the rescue of the petitioner. The Ld. counsel for the petitioner also placed reliance upon the judgment of Hon'ble High Court titled as Superintendent Engineer, HPSEB and Ors. vs. Bhura Ram and Anr., 2007 (2) SLC 279. It is contended that the engagement of new workman without offering job to the petitioner was in violation of the provisions of Section 25-H and he was entitled to its protection in this behalf. The petitioner has placed reliance on the details of the daily paid Chowkidar annexed by the corporation to other parts of the State.

21. Having considered the entire law and the facts on hand it no doubt emerges that the employment of the petitioner was contractual in nature and such may not be termed as “retrenchment”, as per the Industrial Disputes Act. However one thing which glaringly comes to the fore is that the respondent corporation has been resorting to such contractual appointments where the casual labourers are employed for more than one year of continuous service and continued subsisting for a number of years, as in the present case the petitioner was employed for 10 years. There have been instances as per the list on record where people have worked from the period ranging from 10 to 15 years. All of them were engaged for ward and watch of the taken over units by the GIC. People were employed and thereafter disengaged on the basis of such contracts. However no scheme for absorption or even providing them re-engagement on the basis of their seniority in other taken over units was made by the respondent. No doubt scheme and projects generating employment opportunities which are short lived are created by the State and its instrumentalities but even keeping in view the fact that liberal interpretation of labour laws in furtherance of the scheme may not act as such. While granting contractual employment to the people for short period it is still expected of the State and its instrumentalities that some scheme is made atleast in cases where people have put more than five years continuous service with the respondents. If nothing else such workman could have been re-engaged in other take over units, in the different parts of the State. Apparently there is no scheme formulated by the respondents till date. It is high time that such a scheme is formulated by the respondent either to absorb such workmen in the corporation or re-engage them in any other taken over unit in the different parts of the State.

22. Another aspect which strikingly emerged on record is that the petitioner continued to work continuously for about 10 years. No doubt the engagement was on the basis of contract Ex. RW1/B and it did stipulate that his services would come to an end automatically when the new buyer takes possession of the unit. There is no stipulation in the contract that the petitioner would be issued a notice before culmination of the contract. Though there was another stipulation, that the respondents could terminate the services of the petitioner even before the unit was taken over. The purposes of the protection envisaged under the various provisions qua “retrenchment” was that atleast the employee must have some time available at his disposal to search for alternate employment while he looks for a new employment. Retrenchment compensation was also envisaged so that he does not have to frequently approach the employer. It was basically not only as a reward for his previous service rendered to the employer but also sustenance to the worker for the period which may be spent in search for another employment. There was no provision on the said lines in the contract entered inter se the parties. In the present case the agreement is not denied though it is sought to be portrayed as a misrepresentation or fraud. Atleast the contract was on dotted lines and presumably the petitioner did not have much to say, and but to sign the same. This stipulation in the contract and the situation of the petitioner while entering into it was wholly incompatible to the notion of social justice, inasmuch as there is no statutory protection available to the workmen. The contract of service is unilateral in character and it could be described as a mere manifestation of the subdued wish of the workman to sustain his living at any cost. To this limited extent there is discrepancy in the contract Ex. RW1.B. No doubt the applicability of the Industrial Disputes Act *vis-à-vis* retrenchment came to be forestalled by the agreement Ex. RW1/B. However, the totality of circumstances discussed and the fact that the action of the respondents in terminating the services of the petitioner was almost analogous to the closing down of any undertaking and there being no stipulation on the contract compatible to the notions of social justice and statutory provisions of the Industrial Disputes Act. Further seeing to the fact that no scheme had been formulated by the respondent in respect of such workmen who had put in continuously long years of service with the corporation in looking after the taken over unit it is in the interest of justice that some compensation is granted to the petitioner, even though he was not entitled to reengagement. Had the workman being thrown out because of closure of an undertaking he would have been entitled to atleast a notice and compensation in accordance with the provisions of Section 25-F and compensation payable not exceeding average pay for three months for each year. Based on the aforesaid, seeing to the facts the petitioner had put in 10 years in service and even if an average for three months is paid to him as compensation, it would come to around Rs.45000/- approx.. However, the respondents are burdened with the compensation of Rs.50,000/- as a composite whole. The respondent shall also make endeavour to frame certain rules either to absorb such workmen in the corporation on the basis of their seniority or to reinstatement than in another taken over unit as per their seniority.

23. The aforesaid issues are decided accordingly.

RELIEF

24. For all the reasons discussed hereinabove while dismissing the reference the respondents are burdened with compensation amounting to Rs.50,000/-, to the petitioner within a period of 90 days from the award because the petitioner has no doubt been engaged for specific period but still his services could not have been unilaterally terminated automatically. Failing which the respondents shall liable to pay interest @ 9% per annum from the date of award till the payment thereof. The respondents shall make endeavor to frame a policy for absorbing such workmen in the corporation or re-engaging them in the other taken over unit in the State. With the aforesaid directions the reference is disposed of. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for

publication and the file after completion be consigned to the record room. Announced in the open court today the 29th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-Labour
Court, Dharamshala, H.P.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
 CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 128/2007
Instituted on : 25.9.2007
Decided on : 25.5.2010.

Smt. Judhya Devi W/o Late Shri Shesh Ram, R/o Village Sarli (Dalehar), P.O. Dolag, Tehsil, Joginder Nagar,
 District Mandi, H.P.Petitioner

Versus

Executive Engineer I&PH Division, Padhar, District Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy. D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the demand raised by Smt. Judhya Devi W/o Late Shri Shesh Ram, Ex. Daily wages beldar from the Executive Engineer, I&PH Division, Padhar, District Mandi, H.P. for the post of work charge of her husband Late Shri Shesh Ram who was entitled to be regularized as work charge beldar after completing of 8 years of continuous service as daily wages beldar w.e.f. 1.8.99 in the pay scale of Rs.2520-4140 is proper and justified? If yes, what relief of service benefits and amount of compensation and from which date Smt. Judhya Devi W/o Late Shri Shesh Ram is entitled for regular service after death of her husband from the above employer?”

2. Petitioner Smt. Judhya Devi while filing the statement of claim averred that her husband late Shri Shesh Ram was working in Sub Division Joginder Nagar of the I&PH w.e.f. 1.8.1991 continuously as a beldar till 12.4.2004. Except the year 1991 he had completed 240 days in each calendar year.

3. The petitioner further averred that as per the Government Notification dated 8th July, 1999 all daily waged/contingent paid workers who had completed eight years of service (with the minimum of 240 days in each calendar year) as on 31.3.1999 were to be regularized either against available vacant post or by creation of the same. Her husband had completed eight years of service with the minimum of 240 days in each calendar year and as such was entitled for regularization as per the policy of the State. Her husband died while working with the respondent on 12.4.2000.

4. The petitioner thus prayed that the respondent be directed to regularize the services of her husband late Shri Shesh Ram w.e.f. 1.8.1999 along with all consequential benefits.

5. While contesting the claim the respondent inter alia raised the preliminary objections vis-à-vis maintainability, limitation, non-joinder of necessary parties and locus standi.

6. On merits it was not disputed that the said Shesh Ram had not completed 240 days except in the year 1991. It is however the case of the respondent that the process for formulating the policies for regularization started in the year 1999 but sanction for regularization have been received by the department in September, 2002. As per the sanction, the regularization of the daily wagers who had completed eight years of service on 31.3.2000 was to be done

against the vacant post with prospective effect. Since the petitioner's husband expired on 13.4.2000 he could not be regularized.

7. The petitioner in his rejoinder controverted the contentions of the respondent and reiterated his stand taken in the statement of claim.

8. On the pleadings of the parties, the following issues had come to be framed by my Id. predecessor:

1. Whether the petitioner's husband Sh. Shesh Ram was entitled to be regularized as work charged beldar w.e.f. 1.8.1999 in the pay scale of Rs.2520-4140, as alleged. OPP
2. Whether this Court has no jurisdiction to adjudicate upon the dispute raised by the petitioner. OPR
3. Relief.

9. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue No.1 : Yes.

Issue No.2 : No

Issue 2 : Partly allowed as per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

10. It is not disputed that as on 1.8.1999 the deceased Shesh Ram had not completed eight years of service with a minimum of 240 days. The only question which thus gains significance is whether deceased Shesh Ram was to be regularized after having put in eight years of service as on 1.8.1999 or not.

11. The case of the respondent is that since it took time for finalization/sanction of post after formulation of the policy in the year 1999 and as sanction for regularization of daily wagers who had completed eight years of service as on 31.3.2000 was received on 9.9.2002 the deceased workman could not be regularized as he had expired on 13.4.2000.

12. The Executive Engineer, I&PH Division, Padhar who has appeared as RW1 has also deposed on the same lines while appearing as RW1. Per him the second policy for regularization after eight years of service came into effect in September, 2002 and service of the workman was to be counted as on 31.3.2000. As per the first policy the deceased was not eligible and by the time second policy came he had died. The son of Shesh Ram was offered appointment on compassionate ground w.e.f. 1.4.2000 as a daily wager. In his cross-examination the Executive Engineer has admitted that as per "mark A", a notification dated 8th July, 1999 issued by the State any person who had completed eight years as on 31.3.1999 was eligible to be regularization. He had further deposed that the notification was amended to say that eight years service should be completed as on 9th of September, 2002.

13. The respondents have not placed on record any of the policies to substantiate their averments. The petitioner had however, put to the Executive Engineer the notification dated 8th of July, 1999 as mark A. As per the said notification daily wager who had completed eight years of continuous service (with the minimum of 240 days in each calendar year) as on 31.3.1999 was to be regularized w.e.f. 1.4.1999. Subsequent notification which as per the respondent required the regularization to be done after completing eight years as on 31.3.2000 has not been placed on record by the respondent.

14. The regularization of the daily waged workers came to be formulated by the State of Himachal Pradesh in pursuance to the Mool Raj Upadhaya's case. As sequel thereto the first policy for regularization came to be passed by the State in the year 1995. The policy came to be liberalized vide letter dated 23rd September, 1998. As per the norms/principles regarding regularization of daily waged workers formulated therein it was decided by the State that the daily waged workers who have completed nine years of continuous service (with minimum of 240 days in a calendar year) on 31.3.1998 shall be considered for regularization. The respondent has not placed the copies of the regularization policies formulated by the State from time to time. However, while going through the record produced by the respondent I had gone through the policies issued by the State from time to time. While perusing the record it further transpired that after the liberalization of the regularization policy, vide letter dated 23rd September, 1998 the State had again issued certain norms and guidelines on 24th December, 1999 and 8th July, 1999 wherein it was further stipulated that the daily wagers who had completed eight years on 31st March, 1999 shall also be regularized. Eventually on 3.4.2000 another circular was issued by the State wherein all daily waged workers in all the departments

including Universities, Corporations and Boards who have completed eight years of continuous service as on 31.3.2000 were held to be eligible for regularization.

15. Thus it is clearly inferable that after 31.3.1999 the services of daily waged workman who had put in 8 years of service (with minimum of 240 days in a calendar year) were required to be regularized, as per the policy of the State itself.

16. Moreover the subsequent notification dated 3.4.2000 was not in suppression of the earlier notification issued by the State but it was only in partial modification of the earlier letter dated 8th July, 1999 and as such any benefit which was accruable to a workman by virtue of the earlier letter dated 8th July, 1999 was to be granted in case of the eligible candidates. The ineligible candidates left thereupon were to be governed by subsequent letter dated 3.4.2000. By the time the letter dated 3.4.2000 was issued by the State a vested right had accrued in favour of the deceased Shesh Ram and he was liable to have been regularized on the strength of the said letter. The subsequent policies were in fact passed with a view to liberalize the existing policies enunciated by the State. Not only this the letter dated 8th July, 1999 inter alia provided that the regularization was to be done either against the available vacant post or, if vacant post were not available by creation of the posts in the respective organization. Thus as per the letter dated 8th July, 1999 there was no embargo on the regularization subject to the availability of a post, as being projected by the respondent. The ground of non-sanctions being taken of by the respondent which was received on 9.9.2000 in pursuance to the subsequent policy dated 3.4.2000 is thus fallacious. It cannot be believed. The respondent thus wrongfully interpreted the notification/circular issued by the State from time to time. The deceased Shesh Ram having completed eight years of continuous service as a daily wager, with a minimum of 240 days in a calendar year was liable to be regularized w.e.f. 1.4.1999. The action contrary to the same is illegal, arbitrary and against the very notification issued by the State itself. The action of the respondent was thus not proper and justified as per law. The issue is decided accordingly.

ISSUE NO. 2

17. In view of what has been held under the foregoing issue, the petition is perfectly under the jurisdiction of this Court to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not under the jurisdiction of this Court. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

18. For all the foregoing reasons discussed hereinabove supra, the reference is decided partly in favour of the petitioner. As a sequel thereto the husband of the petitioner late Sh. Shesh Ram is directed to be regularized w.e.f. 1.4.1999 along with all consequential benefits flowing thereof. The reference is decided in the aforesaid terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 25th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 267/2008
Date of Institution : 13.6.2008
Date of decision : 20.5.2010

Smt. Kailasho Devi W/o Shri Rawalu Ram, R/o village Karnole, P.O. Sajoo Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kailasho Devi W/o Shri Rawalu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on June 5, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the

eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on June 5, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 582/07-1697, dated 31.3.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated May 7, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 39/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Smt. Kalawati W/o Shri Lalman, R/o Village Sangreh, P.O. Dhalara, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kalawati W/o Lalman by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on January, 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
2. Whether the petition is not maintainable, as alleged. OPR

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| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (1) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (2) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &957/2007-9970 dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 554/2008

Instituted on : 14.7.2008

Decided on : 1.5.2010

Shri Kamal Kant S/o Shri Bhoop Singh, R/o Village Gahara, P.O. Tihra, Tehsil Sarkaghat, District Mandi,
H.P.*Petitioner*

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.
.....*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Kamal Kant S/o Shri Bhoop Singh by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”
2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 23.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.
3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.
4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.
5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.
6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.
7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.
8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been

retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

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|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by his act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

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| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to

be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 23.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred "*that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members....*" There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no crossexamination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.2010, dated 13.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated May 29, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 93/2009

Date of Institution : 26.2.2009

Date of decision : 20.5.2010

Shri Kamal Singh S/o Shri Bhag Singh, R/o Village Chatrena, P.O. Darwad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Kamal Singh S/o Shri Bhag Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.10.2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);

(iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See *Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd.* 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 973/2007-10033, dated 4.1.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 170/2009
Date of Institution : 27.2.2009
Date of decision : 20.5.2010

Smt. Kamla Devi W/o Shri Roshan Lal, R/o Village Banal, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kamla Devi W/o Shri Roshan Lal by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS**ISSUE NO. 1**

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the

orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 830/07-835, dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 24, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 168/2009
Date of Institution : 27.2.2009
Date of decision : 20.5.2010

Smt. Kamla Devi W/o Shri Shali Ram, R/o Village Badresha, P.O. Bairi Brang, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kamla Devi W/o Shri Shali Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on January, 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the mala fide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | |
|---|-----|
| 1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS**ISSUE NO. 1**

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.*(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and

- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be

generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See *Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd.* 1999(82)FLR 137 (SC).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1094 & 1203/07-309 dated 21.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 24, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 133/2007
Instituted on : 29.5.2007
Decided on: : 20.5.2010

1. Shri Yashwant alias Jaswant Singh S/o Shri Ajjet Sing, R/o Village Dhawl, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P
2. Shri Rawalu Ram alias Relu Ram S/o Shri Sunder Singh, R/o village Chhatar Dhawl, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P
3. Shri Jagdish Chand S/o Shri Bhura Ram, R/o Village Sundal, P.O. Mandap, Tehsil Sarkaghat, Distt. Mandi, H.P
4. Shri Mohan Singh S/o Shri Mangat Ram, R/o Village Chowki, P.O. Mandap, Tehsil Sarkaghat, Distt. Mandi, H.P
5. Shri Dalip Singh S/o Shri Sardaru Ram, R/o Village Kaloga, P.O. Mandap, Tehsil Sarkaghat, Distt. Mandi, H.P

6. Smt. Rooma Devi W/o Shri Rattan Chand, R/o village Chowki, P.O. Mandap, Tehsil Sarkaghat, Distt. Mandi, H.P
7. Shri Hem Raj alias Hem Singh S/o Shri Sarwan alias Sarwanu, R/o village Chhater, P.O. Barang, Tehsil Sarkaghat, Distt. Mandi, H.P

.....Petitioners

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

...Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioners : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the termination of services of Shri Yashwant alias Jaswant Singh S/o Shri Ajit Singh and 6 other workmen by the Executive Engineer, B&R Division, HPPWD Dharampur, District Mandi, H.P. w.e.f. 8.7.2005 without complying the provisions of the Industrial Disputes Act, 1947 and by retaining junior workmen are tenable, legal and justified? If yes, what relief of service benefit to the aggrieved workmen is entitled as per demand notice? If not, what is legal effects?”

2. The case of the petitioners, as it emerges from the statement of claim is that they were appointed as a daily waged beldars by the respondent on June, July, August and September, 1998 respectively in Dharampur Division of HPPWD. They continued to work as such till 7.7.2005 and their services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioners that the respondent had maintained no seniority and person juniors to the petitioners have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioners have further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioners further averred that since the Chief Engineer was directly related with the employment of the petitioners and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioners under Section 25-N of the Act were thus illegal. The workmen have filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioners the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioners and other workmen in Dharampur division.

5. It is further averred by the petitioners that they have completed 240 days during the preceding 12 calendar months prior to their termination.

6. The petitioners thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioners be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioners has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioners being stopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioners have been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioners and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioners and other workmen was thus stated to be in accordance with the provisions of the Act.

10. No rejoinder filed. Based on the pleadings the following points came to be framed for determination:-

- | | |
|--|-----|
| 1. Whether the termination of services of the petitioners by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. Whether the petition is not maintainable, as alleged. | OPR |
| 3. Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. Whether the petitioners are guilty of suppressio veri. | OPR |
| 5. Whether the petitioners are estopped from filing the claim petition by their act and conduct. | OPR |
| 6. Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioners are entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of back-wages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioners were not employed as a beldars. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioners and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioners and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioners have been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioners were engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioners were engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioners’ services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioners were said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioners’ retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the

Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioners and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioners on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioners were shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the

workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

23. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

24. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

25. The petitioners having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioners had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

26. The infraction of the provisions of Section 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

27. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.1387/2010 titled as Executive Engineer, HPPWD, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

28. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioners are found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioners and against the respondent.

ISSUE 3

29. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioners for the redressal of their grievance, their claim suffers from the vice of delay and laches, which disentitles their to the reliefs they prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

30. Upon an industrial dispute having been raised by the petitioners, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.199, dated 27.2.2006. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated September 20, 2007. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by their unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps they took for the redressal of their grievance. Their claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioners.

ISSUE 4

31. The respondent's allegation that the petitioners are guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioners.

ISSUE 5

32. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioners are estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioners.

RELIEF

33. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioners are held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of their unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioners forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 267/2008
Date of Institution : 13.6.2008
Date of decision : 20.5.2010

Smt. Kailasho Devi W/o Shri Rawalu Ram, R/o village Karnole, P.O. Sajoo Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kailasho Devi W/o Shri Rawalu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on June 5, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
2. Whether the petition is not maintainable, as alleged. OPR

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| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.*-(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on June 5, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

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ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC))."

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 582/07-1697, dated 31.3.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated May 7, 2008. In view of the

period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 47/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Smt. Kamli Devi W/o Shri Dagu Ram, R/o Village Riyur, P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Kamli Devi W/o Shri Dagu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 10.11.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
2. Whether the petition is not maintainable, as alleged. OPR
3. Whether the petition suffers from the vice of delay and laches. OPR
4. Whether the petitioner is guilty of suppressio veri. OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. :The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

(clxxv) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

(clxxvi) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);

(clxxvii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being

carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and *ex-facie* seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, *vide* Ex.RW1/A-1 is *ex-facie* illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (iii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 10.11.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

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26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 823/2007-9990, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this

Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P.
INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 371/2008
Instituted on : 13.6.2008
Decided on: :24.4.2010

Smt. Kamli Devi W/o Shri Sohan Singh, R/o Vilalge & P.O. Banwar Kalan, Tehsil Sarkaghat, District Mandi,
H.P.

Petitioner

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Smt. Kamli Devi W/o Shri Sohan Singh, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the

provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?"

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 1.8.1998 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers were thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
2. Whether the petition is not maintainable, as alleged. OPR
3. Whether the petition suffers from the vice of delay and laches. OPR
4. Whether the petitioner is guilty of suppressio veri. OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. OPR

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

Issue 1 :	Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being

carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (3) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But is has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*— No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1.8.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o

Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only one namely Roshani Devi, who figures at serial no. 652 in the seniority list Ex. PW1/B and is shown to have been engaged on July 4, 1999, was indubitably junior to the petitioner. The said seniority list is indicative of Roshani Devi having been retained in service at the time the petitioner was retrenched. It may also be noticed that the respondent's witness Sh. Naresh Kumar Sharma, Executive Engineer, HP.PWD Dharampur, admitted in no ambiguous words the petitioner's suggestion in his cross-examination as RW1 *"that Smt. Roshani Devi w/o Nag Ram and Shashi Kant S/o Bihari Lal, whose names figure at serialnos. 652 and 646 respectively in the seniority list Ex. PW1/B, were engaged as daily wagers on 4.7.1999 and 6.4.1999 respectively and are still working with the department."* In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year\ and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred *"that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members...."* There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1822 dated 11.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records.

Announced in the open Court today this 24th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 371/2008
Instituted on : 13.6.2008
Decided on : 24.4.2010

Smt. Kamli Devi W/o Shri Sohan Singh, R/o Vilalge & P.O. Banwar Kalan, Tehsil Sarkaghat, District Mandi,
H.P.*Petitioner*

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

....*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.
For the Respondent : Sh. N.S. Verma, District Attorney

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Smt. Kamli Devi W/o Shri Sohan Singh, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 1.8.1998 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

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|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

- | | |
|-----------|---|
| Issue 1 : | Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(1) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But is has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One

of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1.8.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only one namely Roshani Devi, who figures at serial no. 652 in the seniority list Ex. PW1/B and is shown to have been engaged on July 4, 1999, was indubitably junior to the petitioner.

The said seniority list is indicative of Roshani Devi having been retained in service at the time the petitioner was retrenched. It may also be noticed that the respondent's witness Sh. Naresh Kumar Sharma, Executive Engineer, HP.PWD Dharampur, admitted in no ambiguous words the petitioner's suggestion in his cross-examination as RW1 *"that Smt. Roshani Devi w/o Nag Ram and Shashi Kant S/o Bihari Lal, whose names figure at serial nos. 652 and 646 respectively in the seniority list Ex. PW1/B, were engaged as daily wagers on 4.7.1999 and 6.4.1999 respectively and are still working with the department."* In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred *"that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members...."* There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest

Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1822 dated 11.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2007-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 24th day of April, 2010.

Sd/-
KR. CHIRAG BHANU SINGH
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 56/2005
Date of Institution : 16.3.2005
Date of decision : 29.6.2010

Shri Karam Dass S/o Shri Lal Singh, R/o Village Khanal, P.O. Dhabehad, District Mandi, H.P.

....Petitioner

Versus

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

1. The following reference was received for adjudication from the appropriate Government:
“Whether the termination of services of Shri Karam Dass S/o Shri Lal Singh, workman by the Executive Engineer, HPPWD Division, Udaipur, District Lahaul & Spiti, H.P. w.e.f. 19.10.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was engaged as a daily waged beldar-cum-mate by the respondent in the year 1996 and continued as such till October, 2002. His services came to be terminated thereupon without any notice and in violation of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). He had completed the requisite 160 days required to be completed in the preceding 12 months of his termination in Lahaul and Spiti.

3. The petitioner has requested the respondent to re-engage him but to no avail. They refused to do so. He raised an industrial disputes which culminated in the present reference. That permanent work was available with the respondent department and the services of the petitioner were terminated in order to defeat the right of the petitioner. Even otherwise juniors to the petitioner have still been retained by the respondent and furthermore fresh persons have been engaged by the respondent after the termination of the petitioner. The action of the respondent was thus also violative of the provisions of Section 25-G and 25-H of the Industrial Disputes Act.

4. The petitioner thus seeks re-engagement from the date of his termination along with all consequential benefits.

5. The respondent while controverting the allegations of the petitioner has averred that they adopt a different system for engaging labour in the tribal areas. The department invites quotations from the labour contractors and on the basis of the same supply order was issued in favour of the contractor for the supply of labour for a particular period on contract basis. The petitioner was also engaged as a contract labourer on different occasions through various labour supply contractors. The petitioner had worked with the department in different capacities in different years through the labour supply order of labour on commission basis for different places in the work season i.e. from May to October. He was engaged as per the award to the contractor in each financial year. The petitioner had been engaged through different labour supply contractors as per labour supply orders annexed along with reply. Since the contract labour is engaged for seasonal work and their services are terminated as per the contract. It does not amount to retrenchment as per the provisions of Section 2(o) and 25-F of the Act.

6. While filing rejoinder the averments in the reply were denied and those in the statement of claim were reiterated.

7. I notice that on 28.12.2006 the following issues came to be framed by my ld. predecessor:

1. Whether the dis-engagement from the service of the claimant by the respondent is legal and justified. OPP
2. If the above issue is in affirmative to what relief the claimant is entitled? OPP
3. Whether the claimant was engaged through Contractor in violation of the Contract Labour Abolition and Regulation Act? If so, its effect? OPR
11. Whether the claimant was engaged against specific work by the respondent on whose cessation his engagement came to an automatic end? If, so, its effect? OPR
12. Relief.

8. I have heard the ld. counsel/authorized representative for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 :	No
Issue No.2 :	As per operative part of Judgment.
Issue No.3 :	No
Issue No.4 :	No
Relief. :	Allowed as per the award.

REASONS FOR FINDINGS

ISSUES NO. 1, 2, 3 and 4

9. All the four issues are being clubbed together for discussion as they are co-related and intermingled.

10. The case set up by the petitioner is that his services were disengaged by the respondent in October, 2002. He had worked as a beldar with the respondent since the year 1996 and his services were terminated in October, 2002. On the contrary it is the case of the respondent that the labour is procured by the department on the basis of a supply order from different contractors and the petitioner was also been engaged as a contract labourer on different occasions through various labour supply contractors. In fact there are four other connected references where was a similar stand has been taken by the respondent.

11. On merits it is not denied by the respondent that the petitioner was not working as a beldar since the year 1996 till October, 2002. The respondent has rather placed on record the mandays of the petitioner *vide* Ex. RA. It shows that the petitioner had been working with the respondent since 1996 till the year 2002. Immediately preceding his termination he had completed 160 days of work with the respondent. Needless to reiterate that in a tribal areas like Lahaul & Spiti which remains snow bound except from May to October, 160 days have been specified to be the number of days required to be counted for a period of one year as "continuous service" envisaged under Section 25-B of the Act.

12. On the contrary the respondent has categorically averred that the work in the tribal area is undertaken by the department through labour contractors on different occasions for the supply of labour for a particular period on contract basis. Subsequently the petitioner was also engaged as contract labour on different occasions by various labour supply contractors. The respondent had also placed on record Annexure A to Annexure F being the supply orders for labour. No doubt the documents show that the department had sought labour on supply from different contractors on different dates and for different locations. However, there is no evidence on record that the petitioner had been engaged in pursuance to the said supply orders issued by the respondent. The Executive Engineer, HPPWD, Udaipur while appearing as RW1 has merely stated that since the work can be undertaken in Lahaul valley only for six months the labour is employed on contract. Every year new tenders are invited and work is allowed to new contractors to supply labour. Apart from this generalized statement there is nothing on record to show that even the petitioner had been employed by any one of the contractors whose labour contracts have been placed on record as Annexure A to Annexure F. The said annexures have merely been annexed along with the reply and there is no corresponding evidence to show that the petitioner had been employed in pursuance to the said contract.

13. It is also pleaded case of the respondent that the petitioner has been engaged as a contract labour on different occasions by various labour supply contractors. However the mandays chart show that the petitioner had been consistently working with the respondent department from May to October in each year i.e. from 1996 to 2002. The mandays of the petitioner further is suggestive of the fact that he has completed more than 160 days in four years and even in the other three years working days were more than

130. That being so it cannot be said that the petitioner had been appointed against some specific work only.

14. During the course of arguments I had gone through the record and while perusing the same I noticed that the muster rolls of the petitioners one of them being muster roll No.434 pertaining to the period once 1.7.1998 to 31.7.1998 in respect of petitioner Karam Dass was in respect of a work R/o Snow damages of GBKT Road Km 0/0 to 17/0. It is not inferable from the muster roll that the workmen referred therein were supplied by any contractor. The muster rolls have been issued to the Junior Engineer, Koksar. A part of the record referred in the shape of muster rolls (M.R. No.434, 486, 504, 671, 698, 731, 764, 800, 834, 38, 75, 111, 147, 26, 68, 107, 144, 181, 217, 41, 76, 110, 143, 177 and 212 total 25 no.) pertaining to the period from 1.7.1998 to 1.10.2002 had been retained for perusal. In variably the aforesaid muster rolls have been issued by the department themselves. Thus it cannot be inferred that the petitioner and the other workmen had been working as contract labourers. Had, it been so the muster rolls would have been either issued by the contractor or have not so through the contractor. The payment in respect of muster rolls has been also apparently to the petitioner themselves. Even otherwise there is nothing on record to remotely suggest as to who was the contractor with whom the petitioner had been working. Had the petitioner been working with some contractor certainly the contractor would have got his labour registered with the Labour Inspector, Kullu. The name of the labourers in the shape of a list should have been on record and would have also been supplied as such thereto to the department. It was in fact even required to be done as per the tender. No such document is on record.

15. Not only this from the mandays chart prepared by the respondent themselves the petitioner had been working continuously throughout the working season i.e. May to October. These are the only working days in the Lahaul valley. If that was so it will be inferred that the petitioner was working continuously with the respondent. It is not that labour had been taken on contract by the department for specific work. Even the muster rolls perused during the course of scanning the record shows that the services of the petitioner and the other workmen was taken on different works undertaken by the department themselves.

16. Though the Annexure-A to Annexure-F placed on record have not been tendered or exhibited by the witness for the respondent, but a bare perusal of the supply order show that a particular strength of labour was to be maintained by the contractor and the payment of commission charges were to be made to the contractor at the agreed percentage or on the total amount of the muster rolls and the contractor was to sign the muster roll once in a week and so were the daily reports to be signed by the contractor or by his authorized agent daily and full strength of the labour as stipulated was to be supplied to the Assistant Engineer through the contractor. The perusal of the stipulations of the contract show that the entire list of the contract labourers were to be supplied by them. The entire muster rolls were to be signed by the contractor or his authorized representative including daily reports but nothing has been placed on record to remotely connect the petitioner with any of the contractors.

17. It is thus to be inferred that the petitioner was not engaged through a contractor neither he had been engaged against any specific work by the respondent through contractor.

18. Having come to hold that the petitioner was not a part of the contract labour admittedly no notice had been issued to the petitioner as he was stated to be a contract labourer. I am afraid in those circumstances the disengagement of the petitioner will have to be illegal and unlawful. It was in violation of the provisions of section 25-F and as such liable to be set aside and quashed. It is ordered accordingly.

19. The petitioner while appearing as his own witness has failed to discharge the initial onus of proving that he was not gainfully employed after his termination, as such I am constrained not to award any back-wages to the petitioner. However the respondent shall re-engage the petitioner forthwith along with consequential benefits of seniority and continuity in service from the date of illegal termination i.e. October, 2002, though except back-wages.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 29th day of June, 2010.

KR. CHIRAG BHANU SINGH
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 119/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Kashmir Singh S/o Shri Achhar Singh, R/o village Masdawan, P.O. Baradla, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Kashmir Singh S/o Shri Achhar Singh, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

- | | | |
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| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (i) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any

action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1005/2007-9916, dated 30.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 5, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 264/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Kashmir Singh S/o Shri Sunder Singh, R/o Village Taur Geheri, P.O. Cholgargh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Kashmir Singh S/o Shri Sunder Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 4.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

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| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
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| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, *vide* Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*—No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 4.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the

absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In

view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can

be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See *Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd.* 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1274/07-250, dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 94/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Kehar Singh S/o Shri Kanehya, R/o Village Mortan, P.O. Sadhote, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Kehar Singh S/o Shri Kanehya, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on April, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus,

to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. :The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means—

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,—

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on April, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of

any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In

view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can

be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 866/2007-10034, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 173/2005
Date of Institution : 19.11.2005
Date of decision : 29.6.2010

Shri Keshav Ram S/o Shri Lal Singh, R/o Village Khanar, P.O. Dhabherh, Sub Tehsil Bali-Chowki, Distt. Mandi, H.P.*Petitioner*

Versus

The Executive Engineer, HPPWD Division, Udaipur, Distt. Lahaul & Spiti, H.P.*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Bimal Sharma, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“Whether the termination of services of Shri Keshav Ram S/o Shri Lal Singh workman by the Executive Engineer, HPPWD Division, Udaipur, District Lahaul & Spiti, H.P. w.e.f. 20.10.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”
2. The case set up by the petitioner in the statement of claim is that he was engaged as a daily waged beldar by the respondent in the year 1997 and continued as such till October, 2002. His services came to be terminated thereupon without any notice and in violation of the provisions of Section 25-F of the Industrial Disputes Act (hereinafter referred to as the Act). He had completed the requisite 180 days required to be completed in the preceding 12 months of his termination in Lahaul and Spiti.
3. The petitioner had requested the respondent to re-engage him but to no avail. They refused to do so. He raised an industrial disputes which culminated in the present reference. That permanent work was available with the respondent department and the services of the petitioner were terminated in order to defeat the right of the petitioner. Even otherwise juniors to the petitioner have still been retained by the respondent and furthermore fresh persons have been engaged by the respondent after the termination of the petitioner. The action of the respondent was thus also violative of the provisions of Section 25-G and 25-H of the Industrial Disputes Act.
4. The petitioner thus seeks re-engagement from the date of his termination along with all consequential benefits.
5. The respondent while controverting the allegations of the petitioner has averred that they adopt a different system for engaging labour in the tribal areas. The department invites quotations from the labour contractors and on the basis of the same supply order was issued in favour of the contractor for the supply of labour for a particular period on contract basis. The petitioner was also engaged as a contract labourer on different occasions through various labour supply contractors. The petitioner had worked with the department in different capacities in different years through the labour supply order of labour on commission basis for different places in the work season i.e. from May to October. He was engaged as per the award to the contractor in each financial year. The petitioner had been engaged through different labour supply contractors as per labour supply orders annexed along with reply. Since the contract labour is engaged for seasonal work and their services are terminated as per the contract. It does not amount to retrenchment as per the provisions of Section 2(oo) and 25-F of the Act.
6. While filing rejoinder the averments in the reply were denied and those in the statement of claim were reiterated.
7. I notice that on 10.9.2007 the following issues came to be framed by my Id. predecessor:
 1. Whether the dis-engagement from the service of the claimant by the respondent is proper and justified. OPP
 2. If the above issue is in affirmative to what relief of service benefit the petitioner is entitled to? OPP
 3. Whether the service of the claimant was engaged against a specific period or for a specific work on whose cessation his services came to an automatic end? OPR
 4. Whether the provision of section (2) clause (oo) subclause (bb) an applicable to the fact of the case. If so, its effect? OPR
 5. Relief.
8. I have heard the Id. counsel/authorized representative for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 :	No
Issue No.2 :	As per operative part of Judgment.
Issue No.3 :	No
Issue No.4 :	No
Relief. :	Allowed as per operative part of the award.

REASONS FOR FINDINGS**ISSUES NO. 1, 2, 3 and 4**

9. All the four issues are being clubbed together for discussion as they are co-related and intermingled.
10. The case set up by the petitioner is that his services were disengaged by the respondent in October, 2002. He had worked as a beldar with the respondent since the year 1996 and his services were terminated in October, 2002. On the contrary it is the case of the respondent that the labour is procured by the department on the basis of a supply order from different contractors and the petitioner was also been engaged as a contract labourer on different occasions through various labour supply contractors. In fact there are four other connected references where was a similar stand has been taken by the respondent.
11. On merits it is not denied by the respondent that the petitioner was not working as a beldar since the year 1996 till October, 2002. The respondent has rather placed on record the mandays of the petitioner vide Ex. RA. It shows that the petitioner had been working with the respondent since 1996 till the year 2002. Immediately preceding his termination he had completed 160 days of work with the respondent. Needless to reiterate that in a tribal areas like Lahaul & Spiti which remains snow bound except from May to October, 160 days have been specified to be the number of days required to be counted for a period of one year as "continuous service" envisaged under Section 25-B of the Act.
12. On the contrary the respondent has categorically averred that the work in the tribal area is undertaken by the department through labour contractors on different occasions for the supply of labour for a particular period on contract basis. Subsequently the petitioner was also engaged as contract labour on different occasions by various labour supply contractors. The respondent had also placed on record Annexure A to Annexure E being the supply orders for labour. No doubt the documents show that the department had sought labour on supply from different contractors on different dates and for different locations. However, there is no evidence on record that the petitioner had been engaged in pursuance to the said supply orders issued by the respondent. The Executive Engineer, HPPWD, Udaipur while appearing as RW1 has merely stated that since the work can be undertaken in Lahaul valley only for six months the labour is employed on contract. Every year new tenders are invited and work is allowed to new contractors to supply labour. Apart from this generalized statement there is nothing on record to show that even the petitioner had been employed by any one of the contractors whose labour contracts have been placed on record as Annexure A to Annexure E. The said annexures have merely been annexed along with the reply and there is no corresponding evidence to show that the petitioner had been employed in pursuance to the said contract.
13. It is also pleaded case of the respondent that the petitioner has been engaged as a contract labour on different occasions by various labour supply contractors. However the mandays chart show that the petitioner had been consistently working with the respondent department from May to October in each year i.e. from 1996 to 2002. The mandays of the petitioner further is suggestive of the fact that he has completed more than 160 days in four years and even in the other three years working days were more than 130. That being so it cannot be said that the petitioner had been appointed against some specific work only.
14. During the course of arguments I had gone through the record and while perusing the same I noticed that the muster rolls of the petitioners one of them being muster roll No.434 pertaining to the period once 1.7.1998 to 31.7.1998 in respect of petitioner Karam Dass was in respect of a work R/o Snow damages of GBKT Road Km 0/0 to 17/0. It is not inferable from the muster roll that the workmen referred therein were supplied by any contractor. The muster rolls have been issued to the Junior Engineer, Koksar. A part of the record referred in the shape of muster rolls (M.R. No.434, 486, 504, 671, 698, 731, 764, 800, 834, 38, 75, 111, 147, 26, 68, 107, 144, 181, 217, 41, 76, 110, 143, 177 and 212 total 25 no.) pertaining to the period from 1.7.1998 to 1.10.2002 had been retained for perusal. Invariably the aforesaid muster rolls have been issued by the department themselves. Thus it cannot be inferred that the petitioner and the other workmen had been working as contract labourers. Had, it been so the muster rolls would have been either issued by the contractor or have not so through the contractor. The payment in respect of muster rolls has been also apparently to the petitioner themselves. Even otherwise there is nothing on record to remotely suggest as to who was the contractor with whom the petitioner had been working. Had the petitioner been working with some contractor certainly the contractor would have got his labour registered with the Labour Inspector, Kullu. The name of the labourers in the shape of a list should have been on record and would have also been supplied as such thereto to the department. It was in fact even required to be done as per the tender. No such document is on record.
15. Not only this from the mandays chart prepared by the respondent themselves the petitioner had been working continuously throughout the working season i.e. May to October. These are the only working days in the Lahaul valley. If that was so it will be inferred that the petitioner was working continuously with the respondent. It is not that labour had been taken on contract by the department for specific work. Even the muster rolls perused during

the course of scanning the record shows that the services of the petitioner and the other workmen was taken on different works undertaken by the department themselves.

16. Though the Annexure-A to Annexure-E placed on record have not been tendered or exhibited by the witness for the respondent, but a bare perusal of the supply order show that a particular strength of labour was to be maintained by the contractor and the payment of commission charges were to be made to the contractor at the agreed percentage or on the total amount of the muster rolls and the contractor was to sign the muster roll once in a week and so were the daily reports to be signed by the contractor or by his authorized agent daily and full strength of the labour as stipulated was to be supplied to the Assistant Engineer through the contractor. The perusal of the stipulations of the contract show that the entire list of the contract labourers were to be supplied by them. The entire muster rolls were to be signed by the contractor or his authorized representative including daily reports but nothing has been placed on record to remotely connect the petitioner with any of the contractors.

17. It is thus to be inferred that the petitioner was not engaged through a contractor neither he had been engaged against any specific work by the respondent through contractor.

18. Having come to hold that the petitioner was not a part of the contract labour admittedly no notice had been issued to the petitioner as he was stated to be a contract labourer. I am afraid in those circumstances the disengagement of the petitioner will have to be illegal and unlawful. It was in violation of the provisions of section 25-F and as such liable to be set aside and quashed. It is ordered accordingly.

19. The petitioner while appearing as his own witness has failed to discharge the initial onus of proving that he was not gainfully employed after his termination, as such I am constrained not to award any back-wages to the petitioner. However the respondent shall re-engage the petitioner forthwith along with consequential benefits of seniority and continuity in service from the date of illegal termination i.e. October, 2002, though except back-wages.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 29th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 500/2008
Instituted on : 14.7.2008
Decided on: : 1.5.2010

Shri Kewal Krishan S/o Shri Roop Lal, R/o Village Bardana, P.O. Dharampur, Tehsil Sarkaghat, District Mandi, H.P.*Petitioner*

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Shri Kewal Krishan S/o Shri Roop Lal, by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent no.3 on 1.12.1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by his act and conduct. | OPR |

6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:—

Issue 1 :	Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such

area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But is has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertng to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

- (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (iii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 7 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.12.1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of his unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of his affidavit Ex. PW1/A inter alia averred *"that after his illegal retrenchment he tried his level best to secure job but he did not get the same till today and he has no source of income even to have two square meals per day for his and his family members...."* There being no rebuttal to this deposition of her, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/2005 & 369/07-2065, dated 16.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 24, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his

unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 602/2008
Date of Institution : 29.10.2008
Date of decision : 20.5.2010

Shri Kishori Lal S/o Shri Raghu Ram, R/o Village Siram, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Kishori Lal S/o Shri Raghu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:—

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

OPP

- | | | |
|----|---|-----|
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (iii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 807/2007-9229 dated 12.10.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated July 27, 2008. In view

of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 56/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Krishan Chand S/o Shri Saju Ram, R/o Village Jhareda, P.O. Pehad, Tehsil Sarkaghat, Distt. Mandi, H.P.
....*Petitioner*

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
Sh. Vijay Kaundal, Adv.
For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Krishan Chand S/o Shri Saju Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum- Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

OPP

- | | | |
|----|---|-----|
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 876/2007-10010, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 371/2002
Date of Institution : 29.11.2002
Date of decision : 15.6.2010

Shri Krishan Kumar S/o Shri Mool Chand, R/o Village H.K. Niwas Mohalla Pipplan, Bhadroya Road, Pathan Kot, Punjab.

....Petitioner

Versus

1. Regional Manager, H.R.T.C. Chamba. Distt. Chamba, H.P.
2. Divisional Manager, H.R.T.C. Division Dharamshala-176215.
3. Managing Director, H.R.T.C. Shimla-171003.

....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. Pradeep Dogra, Adv.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“Whether the removal from services of Sh. Krishan Kumar S/o Sh. Mool Chand R/o Mohalla-Pipplan, Bhadroya Road, Pathankot, Punjab by the Management of HRTC Shimla in view of Charges for not issuing tickets to the passengers amounting Rs.9.60/- Rs. 2.50/-, and Rs.1.30/- on three different occasions on account of the circumstances beyond the control of workman; is justified? And whether the punishment imposed on workman is commensurate with the charges of misconduct? If not, what relief of service benefits, seniority etc. Sh. Krishan Kumar S/o Shri Mool Chand is entitled to?”

2. As per the case set out in the statement of claim the petitioner Krishan Kumar came to be initially appointed as a Conductor on 1.9.1967 in Mandi-Kullu Road Transport Corporation and after the merger of this Corporation in Himachal Pradesh Road Transport Corporation. His services were transferred to the said corporation. The petitioner came to be posted in Pathankot Depot. On 28.3.1980 while he was working as conductor on bus bearing No.HP-K-5714 which was on its way from Sandhole to Pathankot, the bus came to be checked at Jungle Berry and the petitioner was issued a charge-sheet dated 18.5.1980. The charge-sheet inter alia set out the following allegations against him:

- (i) Attempt to embezzle corporation legitimate revenue to the tune of Rs.9.50 paisa and misbehaviour.
- (ii) Gross indiscipline and misbehaviour.
- (iii) Willful absence creating undue harassment and inconvenience to the passenger and affecting the name of corporation in the eyes of general public, especially the passenger of Bus No.HPK-5637.
- (iv) Late deposit of corporation cash and embezzlement of corporation revenue i.e. Rs.1.30 paisa.
- (v) Dereliction of duty.

3. As the sequel to the charge-sheet the inquiry came to be ordered on the aforesaid charges. The petitioner demanded the services of one C.L. Bhandari for assisting him in the inquiry proceedings. But his request was not acceded to.

4. The petitioner was the Secretary of the Drivers and the Conductors union of the HRTC and as such had incurred the wrath of the higher officials. The petitioner was placed under suspension on various occasions after serving the charge-sheet and even his promotion and increments were stopped due to his trade union activities.

5. It is further the case of the petitioner that no fair and proper inquiry was conducted by the respondent. The same was against the basic principles of Industrial Disputes Act (hereinafter referred to as the Act). Eventually his services came to be terminated by the respondent on 1.3.1998. And even before imposing penalty the copy of the inquiry had not been supplied to the petitioner.

6. The act of the respondent was stated to be arbitrary and malafide. The punishment imposed was not commensurate to the alleged offence and ignored the fact that the petitioner had rendered 21 years of meritorious service with the respondents. The petitioner had approached the authorities a number of times and even agitated the matter with the Tribunal but since the removal from service falls within the ambit of Industrial Disputes Act the petitioner has approached this Court. He thus sought reinstatement with all consequential benefits.

7. The respondents while contesting the claim inter alia raised the preliminary objections that the case of the petitioner already stands considered by the Hon'ble State Administrative Tribunal in O.A. No. 82/1988 and the same had come to be rejected by it vide judgment dated 27.7.1993. The petitioner was also stated to be guilty of concealing material facts from this Court.

8. On merits it is the case of the respondents that the petitioner was involved in three different gross misconduct, embezzlement and misbehaviour. Accordingly he was proceeded under the CCS (CCA Rules) and was charge-sheeted under Rule 14 for imposition of major Penalty. Ample opportunity was given to the petitioner before the Inquiry Officer.

9. The imposition of penalty was earlier assailed by the petitioner before the H.P. Administrative Tribunal vide O.A. No.82/1988 and the same was rejected on merits by the said Tribunal. It was prayed that the claim may be dismissed.

10. The replication was filed to the reply and the averments therein were denied and those in the statement of claim were reiterated by the petitioner.

11. I notice that on 27.7.2005 the following issues came to be framed by my Ld. Predecessor.

1. Whether the services of the petitioner were terminated by the respondent for his mis-conduct in not issuing the tickets to the passengers amounting to Rs.9.60/-, 2.50/- paisa and Rs.1.30/- on three different occasions on account of the circumstances beyond his control without considering the fact that the alleged misconduct on the part of the petitioner was without his control, in an improper and unjustified manner? OPP
2. Whether the punishment imposed on the workman is not commensurate with the charges of misconduct as alleged against the petitioner? OPP
3. If issue No.1 and 2 are proved in affirmative, to what service benefits the petitioner is entitled to? OPP
4. Whether the petition is not maintainable in view of the decision of the Admn. Tribunal in OA No.82/88 decided on 27.9.1993, alleged? OPR
5. Whether the applicant has concealed the material facts if so its effect? OPR
6. Whether the petitioner was afforded ample opportunity by the respondent while conducting an inquiry under section 14 of the CCA Conduct Rules and removed the petitioner as per the report of the inquiry officer, if so its effect? OPR
7. Relief.

12. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue 1 :	Yes
Issue 2 :	Redundant
Issue 3 :	No
Issue 4 :	No
Issue 5 :	Redundant
Issue 6 :	Redundant
Relief :	Reference is dismissed as per the operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 4

13. The first and foremost issue which is required to be determined in the present case is as to what is the effect of the decision of the Administrative Tribunal in O.A. No.82/88 decided on 27.9.1993. The respondents have taken a categorical stand that the ground of the petitioner vis-à-vis his termination has been squarely been considered and rejected on merits by the Hon'ble Administrative Tribunal while deciding O.A. No.82/1988 on 27.7.1993. The certified copy of the judgment had been annexed along with reply by the respondent.

14. The Divisional Manager of the Himachal Road Transport Corporation who has appeared as RW1 has also reiterated the said factum in his deposition. The petitioner has also admitted the same in his crossexamination.

15. Though the petitioner has not averred categorically regarding the same but has tried vaguely to report the said factum to avoid the ignominy of being termed as suppression of material facts. While appearing as PW1 he has also tried to portray that since his termination falls within the ambit of the Industrial Disputes Act, the Tribunal had no jurisdiction to entertain the lis.

16. The perusal of the certified copy of the O.A. No.82/1988, which was passed on the asking of the petitioner, it transpires that the petitioner had challenged his termination based on the same charge-sheet dated 12th of May, 1980. The charges as reflected in page no. 2 of the O.A. are verbatim the same, as have been discussed hereinabove.

17. The cause of action on which the petitioner has approached this Court now has been conclusively put to rest by the Hon'ble Administrative Tribunal as far as back as July 23, 1993. The matter had been decided on its merits. It would be apposite to reproduce the operative part of the judgment, which reads thus:

“.....Keeping in view the facts and circumstances of this case we are un-hesitatingly of the view that lesser punishment was not required in this case and the punishment imposed upon the applicant by respondent

No.1 is commensurate with the offences for which he had been chargedsheeted, keeping his past conduct also in view and there is no scope for clemency. The upshot of foregoing discussion is that the contentions of the applicant are unmeritorious and the application is hereby rejected.”

18. The petitioner having himself sought findings qua the same offences alleged against him and having got an unequivocal finding from the Administrative Tribunal cannot again now turn around to contend that the Administrative Tribunal had no jurisdiction and the matter regarding removal from service falls within the ambit of the Industrial Disputes Act and as such the said judgment/order was not binding on him. He cannot be allowed to aprobate and reprobate in the same breadth. Not only is the petitioner estopped from having a declaration from this court vis-à-vis his termination as he has already availed a legal remedy in this behalf. The earlier case filed by the petitioner was dismissed on merits. It rather debars the petitioner from claiming the same relief on the grounds of res-judicata too.

19. Rather after having sought finding against him on merits it was not open to the petitioner to have resorted to the provisions of the Industrial Disputes Act. The judgment was passed by the Tribunal way back on 1993. The failure report was sent by the Labour Officer-cum-Conciliation Officer, Dharamshala on 9.5.2002. Apparently the petitioner had raised the dispute somewhere in the year 2000 i.e. after about seven years of the judgment having been passed by the Hon'ble Administrative Tribunal. In fact by then the petitioner had lost the right as well as the remedy to approach this Tribunal. More so keeping in view the conclusive findings arrived at by the Administrative Tribunal on the same cause. The issue is decided in favour of the respondent and against the petitioner.

ISSUES NO. 1, 2, 3, 5 and 6

20. In view of the findings arrived at in respect of issue no.4 the findings qua this issues have become redundant. The same cause of action already stands conclusively determined by the Administrative Tribunal vide O.A. No.82/1988. The issues are thus accordingly decided against the petitioner.

RELIEF

21. For all the reasons discussed above the reference fails and is dismissed. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 15th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 75/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Mrs. Lajja Devi W/o Shri Roshan Siingh, R/o Village & P.O. Ropadi, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Mrs. Lajja Devi W/o Shri Roshan Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the

provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?"

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of "First come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |

- | | | |
|----|---|-----|
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that

in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (1) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
 - (2) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
 - (3) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &884/2007-9996 dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 358/2008

Instituted on : 13.6.2008

Decided on: : 1.5.2010

Smt. Lajja Devi W/o Shri Chand Lal, R/o Village Banaal, P.O. Baroti, Tehsil Sarkaghat, District Mandi, H.P.
.....*Petitioner*

Vs

The Executive Engineer, H.P.P.W.D. Division Dharampur, Tehsil Sarkaghat, District Mandi, H.P.

.....*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Suresh Kumar, Adv.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether retrenchment of services of Smt. Lajja Devi W/o Shri Chand Lal by the Executive Engineer, H.P.P.W.D. Division, Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f.08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above Ex.-Worker is entitled to from the above employer?”
2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent no.3 on 4.12.1998 in Dharampur Division of HPPWD. She continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.
3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H.
4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.
5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.
6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits.
7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.
8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been

retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent no.3 to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should

look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless she has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 7 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 4.12.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also been testified to be correct by the Executive Engineer, Shri Naresh Kumar Sharma who has appeared as RW1. The reply and the testimony of the Executive Engineer lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. Further, the petitioner in her affidavit Ex. PW1/A alleged that the workmen namely Savitri Devi W/o Sh. Roshan Lal, Rajesh Kumar S/o Sh. Sunder Singh, Shashi Lal S/o Bihari Lal, Satpal S/o Sunder, Roshani Devi W/o Nag Ram, Gulab Singh S/o Bhalkhu, Devinder Kumar S/o Ram Dyal, Barfu Ram S/o Haru Ram, Krishana Devi W/o Prem Singh, Achhri Devi W/o Sh. Prabha Ram, Barfi Devi W/o Amrit Lal, Raj Kumar S/o Sh. Chand Ram and Ranjeet Singh S/o Sh. Kashmir Singh, who were junior to her, were still working with the respondent. Of these workmen, however, only two namely Roshani Devi and Shashi Lal, who figures at serial no. 646 and 652 in the seniority list Ex. RW1/C and are shown to have been engaged on 6.4.1999 and 4.7.1999 respectively, were indubitably junior to the petitioner. The said seniority list is indicative of Shashi Lal and Roshani Devi having been retained in service at the time the petitioner was retrenched. In terminating the services of the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act as well. The petitioner is therefore entitled to reinstatement and continuity of service from the date of her unlawful retrenchment.

26. The respondents have not only violated the provisions of the Act as discussed above but have yet again failed to respect the statutory mandate of Section 25-H which obligates the respondents to re-engage the retrenched workmen as per their seniority. In other words if the employer recruits fresh hands without offering employment to the persons previously retrenched the employer shall be committing breach of the provisions of Section 25-H of the Act which is otherwise mandatory in nature. The perusal of the seniority list Ex. PW1/C shows that the respondent had employed daily waged beldars even in the year 2006. One Rattan Chand S/o Shri Khem Chand whose name figure at serial no. 698 was appointed on 13.3.2006. One Sukh Ram S/o Dido Ram also came to be appointed on the same date. One Jagdev S/o Shri Ranjeet Singh who is figuring at serial no.700 of the seniority list (Ex. PW1/C) came to be appointed on 1.2.2006.

27. The petitioner having been retrenched on 8.7.2005, it is more than clear that the respondent had offered employment to fresh hands after the disengagement of the petitioner. The petitioner had a preferential right to be offered re-engagement on the basis of the provisions of Section 25-H of the Act and any violation thereof smacks of mala fide, apart from the same being illegal, arbitrary, unjust and against the mandate of the Act.

28. The infraction of the provisions of Section 25-G and 25-H is in itself fatal to the respondents as it is well settled preposition of law that the applicability of the two provisions is not confined only to workmen who were in continuous service for one year and above, as provided in the Act, but to all retrenched workmen. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G and 25-H are independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G and 25-H. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

29. The petitioner in paragraph 4 of her affidavit Ex. PW1/A inter alia averred "*that after her illegal retrenchment she tried her level best to secure job but she did not get the same till today and she has no source of income even to have two square meals per day for her and her family members....*" There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G and even 25-H by appointing fresh hands in the year 2006 without offering engagement to the retrenched workmen, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

30. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

31. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs she prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See *Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd.* 1999(82)FLR 137 (SC).

32. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1821, dated 11.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 30, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps she took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

33. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of her having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

34. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

35. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 378/2008

Date of Institution : 13.6.2008

Date of decision : 20.5.2010

Smt. Lakshmi Devi W/o Shri Balam Ram, R/o village Karnohal, P.O. Sajauo Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Lakshmi Devi W/o Shri Balam Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on June, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 : No.

Issue 3 : No

Issue 4 : No

Issue 5 : No

Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per

working day for the preceding twelve months. The expression “industrial establishment” is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

“25L (a) “*industrial establishment*” means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

- (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on June, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of

back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See *Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd.* 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.1834 dated 11.4.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/07-Mandi dated April 29, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 101/2002

Instituted on : 23.4.2002

Decided on : 4.5.2010.

Shri Lehar Singh S/o Shri Tej Ram, R/o Village Parkehar, P.O. Dand, Tehsil Salooni, Distt. Chamba, H.P.

.....Petitioner

Vs

Executive Engineer, HPPWD Division Salooni, Distt. Chamba, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.R. Bhardwaj, AR.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. The following reference has been received from the appropriate Government for adjudication:

“कि क्या श्री लैहर सिंह, दैनिक भौगी कारपेंटर ग्रेड-I, सुपुत्र तेज राम, गांव परकेहड, डाकखाना डांड, तहसील सलूनी, जिला चम्बा का अधिशासी अभियन्ता हिमाचल प्रदेश लोक निर्माण विभाग, मण्डल, सलूनी, जिला चम्बा द्वारा कामगार का वेतन पदानुसार किया जा रहा भुगतान जो अगस्त, 1998 में मु0 रुपये 82/- प्रतिदिन था, उसे घटा कर सितम्बर, 1998 में मु0 रु0 65/- प्रतिदिन की दर से भुगतान करना उचित है, यदि नहीं, तो उपरोक्त कामगार उपरोक्त नियोजक से किस वेतन भुगतान, पूर्व सेवा लाभ और राहत का पात्र है।”

2. The short point raised by the petitioner in his statement of claim is that he was working as a Carpenter Grade-I on daily wages basis with the respondent and was getting a daily of Rs.82/- till August, 1998 as per the minimum wages prescribed by the State of Himachal Pradesh. His daily was reduced from Rs.82/- to Rs.65/- w.e.f. September, 1998 and that too without issuing any notice. Aggrieved by the reduction of his daily the petitioner has approached this Court. Per him he had made repeated requests to the respondent but to no avail.

3. The petitioner thus prayed that the respondent be directed to pay daily @ Rs.82/- per day to the petitioner w.e.f. 1.9.1998 along with arrears.

4. While contesting the claim the respondent raised the preliminary objection that due to some clerical mistake the petitioner was issued the rate of Carpenter Grade-I @ Rs.82/- per day instead of Rs.65/- per day in August, 1998. As per the Notification issued by the State of H.P. in September, 1998 the mistake was rectified by the department and the petitioner was granted actual rate i.e. Rs.65/- per day as per Notification No. Fin.(PR)(7)-15/98, dated 13.8.1998. It is however not disputed by the respondent that the petitioner was not working as a daily waged Carpenter Grade-I. It is further averred by the respondent that the petitioner has since been appointed as a regular Carpenter Grade-IV w.e.f. 7.1.2003 and he has joined as such on 14.1.2003.

5. On merits the respondent has not denied that the petitioner was not working as Carpenter Grade-I. Strenuously, they have raised a plea that he was not paid daily @ Rs.82/- per day, but he was provided minimum wages as granted by the State Government from time to time.

6. It is again reiterated by the respondent that the petitioner had been paid Rs.82/- per day to a clerical mistake only in August, 1998 when the minimum wages was enhanced by the State Government. The said mistake was correct in the next month i.e. in September, 1998. Since it was only a mistake it was amended and as such there was no necessity of indicating any reason in writing to the petitioner.

7. While filing rejoinder the contentions raised in the reply were denied and those in the statement of claim were reiterated by the petitioner.

8. The short and simple pleadings culminating in the framing of the following issues:

1. Whether the petitioner is entitled for wages @Rs.82/- (Eighty Two) per day as compared to the wages, respondent started paying him at the rate of Rs.65/- P.A. w.e.f. September, 1998, as alleged?

OPP

- | | | |
|----|--|-----|
| 2. | Whether the petitioner is entitled for difference of wages as claimed? | OPP |
| 3. | Whether the petitioner does not fulfill the condition of the post of Carpenter grade-I if so its effect? | OPR |
| 4. | Relief. | |

9. I have gone through the pleadings, evidence and other attendant material placed on record. For the reasons to be recorded hereinafter, my findings on these issues are as under:—

- | | |
|-----------|---|
| Issue 1 : | Yes, The petitioner is entitled to Rs.93/- per day as Carpenter Grade-I |
| Issue 2 : | Yes. |
| Issue 3 : | No |
| Relief : | Allowed as per operative part of the reference. |

REASONS FOR FINDINGS

ISSUES 1, 2 and 3

10. All the three issues being co-related and dexterously intermingled are being taken up together for discussion.

11. At the very outset it would be relevant to highlight that the respondent has not disputed the fact that the petitioner had been working as a Carpenter Grade-I, while he was employed as a daily waged worker with the respondent. No doubt he was regularized as a Carpenter Grade-IV in the year 2003. The muster rolls of the petitioner placed on record by the respondent themselves, Exhibits RW1/B and RW1/C also show that the petitioner was indeed working as a Carpenter Grade-I. Though in para 8 of the reply the respondent has in a veiled manner tried to portray that the petitioner had not fulfilled the terms and conditions for the post of Carpenter Grade-I as per R & P Rules, but it was not taken as a ground to contend that for the said reason the petitioner was not paid the daily of a Grade-I Carpenter. Even the Executive Engineer, HPPWD Salooni Shri S.S. Dhiman who has appeared as RW1 has not denied that the petitioner was not employed as a Grade –I Carpenter. There is nothing on record either testified by RW1 or placed on record by way of documentary evidence to show that the petitioner did not fulfill terms and conditions for appointment as a Carpenter Grade-I.

12. The fact of the petitioner having worked as a Carpenter Grade-I not being in a dispute. The only short question which requires to be determined is as to what was the wages payable to a Carpenter Grade-I as per the Government Notification and as such payable to the petitioner.

13. In this behalf the respondent themselves have placed on record Notification dated 13.8.1998 as Ex. RW1/E. As per the said notification the rate of wages of all daily wagers in Himachal Pradesh came to be revised w.e.f. 1.8.1998 as per the rates shown in Annexure-I thereto. The Annexure-I whereof provided that a Carpenter Grade-III (reflected at serial no.51) was to be paid revised wages @ Rs.54.5/-, Carpenter Grade-II and Carpenter Grade-III Rs.65/- (as reflected at serial nos. 96 and 97). However, incidentally Carpenter Grade-II was also reflected at serial no.148 of the list and was held entitled to a daily of Rs.82/-. As per the Annexure-I Carpenter Grade-I was entitled to receive Rs.93/- as revised daily (serial no.151 of Annexure -I).

14. If the notification is taken into consideration, in fact the petitioner who was a Carpenter Grade-I was entitled to Rs.93/- as daily w.e.f. 1.8.1998. There can be no two opinion about the same. The notification Ex. RW1/E is clear and categorical in this behalf. The petitioner evidently having worked as a Carpenter Grade-I was entitled to Rs.93/- as revised daily w.e.f. 1.8.1998. The case set up by the respondent thus is totally fallacious. It is not tenable in any way.

15. In fact the close scrutiny of the notification shows that there is glaring discrepancies as regards a revised daily of Carpenter Grade-II and Grade-III. The Carpenter Grade-II has been reflected at serial no.96 and serial no.148 of Annexure -I of the notification and the revised dailies payable to them has also been reflected as Rs.65/- and Rs.82/- respectively. The same is the case of Carpenter Grade-III. They have been reflected at serial no.51 and 97 of Annexure-I and there dailies have been reflected as Rs.54.50/- and Rs.65/- respectively. These discrepancies, no doubt might have created confusion but it was the duty of the department concerned to seek a clarification from the finance department, which apparently was not done. There is no evidence on record to substantiate the said fact. Nor is there any evidence to show that the said notification had been clarified by the finance department. There is no corrigendum or clarification on record removing the glaring discrepancies. Even if assuming that the benefit of this discrepancy was to be given to the department, which in fact is also not sustainable on the touch stone of legal scrutiny as once the Carpenter Grade-I is given a revised pay scale of Rs.93/-. It is quite obvious that Carpenter Grade-II would be entitled to Rs.82/- and Carpenter Grade-III entitled to Rs.65/- (as per the Government's notification itself). Seeing to the

rationale behind the notification it is the only interpretation which can be given to Annexure –I. However, in the facts and circumstances of the present case even the said discrepancy is not fatal to the petitioner because he was admittedly working as Carpenter Grade-I and as per the notification he was entitled to a revised daily of Rs.93/- w.e.f. 1.8.1998. For in the case of Carpenter Grade-I there is no overlapping and the daily reflected is only Rs.93/-, unlike Carpenter Grade-II and III who have been given different wages as different serial numbers. The ground taken by the respondent that it was because of clerical mistake that he had been granted Rs.82/- in the month of August, 1998 is thus not believable. The plea is on the face of it false and not worth of any merit.

16. The petitioner is entitled to revised daily of Rs.93/- w.e.f. 1.8.1998.

17. Ld. Dy. D.A. has however very strenuously urged that the scope and ambit of reference is only limited to the extent as to where the petitioner was entitled to Rs.82/- or Rs.65/- and as such the findings recorded above may go beyond the purview of the reference.

18. Having considered the arguments of the Ld. Dy. D.A. I am afraid that the said cannot be countenanced. The payment of revised daily was in pursuance to the Government notification dated 14 August, 1998. It is clear and categorical and so is the amount as reflected in annexure AI appended along with the notification. All the workmen as categorized in Annexure-1, issued by the State of H.P. were to be paid revised daily w.e.f. 1.8.1998. The notification in question was in the custody of the employer. The employee hardly had access to it. It was the onerous duty of the employer and the respondent too abide by the notification. No doubt there was discrepancy as far as the Carpenter Grade-II and Grade-III were concerned but vis-à-vis Carpenter Grade-I the notification was clear and candid. It had to be executed in simple terms as reflected vide Annexure-I of the said notification. The action of the respondent in even giving Rs.82/- as daily in the month of August, 1998 was per se illegal as he was entitled to a daily of Rs.93/-. Even offering of Rs.82/- as daily in August, 1998 was illegal as the petitioner was entitled to Rs.93/- per day. The workman thus only assailed the act of the respondent in withdrawing the said daily. Even otherwise the reference otherwise also postulate as to what benefits including wages the petitioner is entitled to. If the action of the respondent in reducing his daily to Rs.65/- is held to be bad the natural consequences thereto are to follow. The scope of reference thus includes a determination by this Court as to what was the daily the petitioner was entitled to in pursuance to the revision effected by the State Government. The answer is simple. It has to be Rs.93/- in case of Carpenter Grade-I. The petitioner was a Carpenter Grade-I as a daily wagger.

19. The pleadings and evidence on record clearly show that the petitioner was entitled to Rs.93/- per day as per notification dated 13.8.1998 Ex. RW1/E. It is held accordingly. 20. As a sequel to the discussion above it is held that the action of the respondent not offering him revised daily as per Government notification dated 13.8.1998 (Ex.RW1/E) was illegal and unjust. The petitioner is further held entitled to Rs.93/- per day as daily as a Carpenter Grade-I w.e.f. 1.8.1998 till 14.1.2003, when the petitioner came to be regularized as a Carpenter Grade-IV. The issues are accordingly answered in favour of the petitioner.

RELIEF

21. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The action of the respondent in not offering revised daily to the petitioner in pursuance to the Government notification dated 13.8.1998 (Ex. RW1/E) is held to be wrong and illegal. Consequently the petitioner is held entitled to daily of Rs.93/- per day as a Carpenter Grade-I w.e.f. 1.8.1998 till 14.1.2003 when the petitioner was appointed as a Carpenter Grade-IV on regular basis. The respondent shall pay the difference thereof to the petitioner within 90 days from today. The respondent is also burdened with interest @ 6% per annum w.e.f. 1.8.1998 as the payment of revised daily had been withheld without any rhyme and reason. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 4th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 51/2007
Date of Institution : 26.4.2007
Date of decision : 19.6.2010

Shri Madho Ram S/o Shri Tani Ram, R/o Village Chatolu, P.O. Banate, Tehsil Chowari, District Chamba, H.P.Petitioner

Versus

The Executive Engineer, I & P.H. Division, Dalhousie, District Chamba, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.R. Bhardwaj, AR

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

1. The following reference was received for adjudication from the appropriate Government:

“Whether the action of the Executive Engineer, I&PH Division, Dalhousie, District Chamba, H.P. not to regularize the services of Shri Madho Ram S/o Shri Tani Ram workman w.e.f.1.1.2001 is proper and justified? If not, what relief of service benefits and from which date the above aggrieved workman is entitled for regularization?”

2. Per the petitioner he was engaged as daily wager in the month of January, 1991 under I&PH Division, Dalhousie. He worked as such till 30.12.2002. During the said interregnum he had completed 240 days continuous service in each calendar year.

3. The petitioner had completed 10 years of continuous service as on 31.12.2000 and as such was entitled for regularization. He was entitled for regularization in the work charge cadre in the pay scale of Rs.2620-3120 w.e.f. 1.1.2001 in terms of the judgment of the Hon’ble Supreme Court in Mool Raj Upadhaya case and the subsequent notification issued by the State from time to time.

4. The State of H.P. vide notification dated 3.4.2000 and 6.5.200 had directed of the departments/boards, corporations to regularize the service of daily wager who had completed 8 years continuous service with 240 days in each calendar was as on 31.3.2000. Since the petitioner had completed the requisite stipulation of the policy he was entitled to be regularized as a work charge beldar w.e.f. 1.4.2000. On the basis of the aforesaid policy all workmen have been regularized. However, the petitioner was not offered the same benefit.

5. The petitioner thus seeks regularization w.e.f. 1.4.2000 or 1.1.2001.

6. The respondent while contesting the claim raised the preliminary objections *vis-à-vis* jurisdiction.

7. On merits it is not denied that the government has framed a policy to regularize the services of workmen who had completed 10 years of continuous service with minimum of 240 days in each calendar year. It is admitted that the petitioner has completed 10 years of continuous service on daily wage basis as on 31.12.2000. Further per the respondent when the policy dated 29.8.2002 was made applicable to the workmen who had completed eight years of continuous service as on 31.12.1999 and were to be regularized but the petitioner was not fulfilling the criteria at that time. He was retired on 31.12.2002 after attaining the age of superannuation of 60 years. The policy dated 29.8.2002 which laid down that the workmen who had completed eight years on 31.3.2000 were to be regularized subject to availability of the post and as per R&P rules. However by the time relaxation was received vide letter dated 21.12.2002 the petitioner had become overage in view of govt. notification dated 10.5.2001 whereby the age of retirement of all class IV government servant was to the 58 years. On these premises the respondent sought dismissal of the claim.

8. While the petitioner filed rejoinder the averments in the reply were denied and reiterated the stand taken in the statement of claim.

9. I notice that my Ld. Predecessor had framed the following issues on 3.7.2008 for determination:

- | | |
|---|-----|
| 1. Whether the respondent’s failure to regularize the services of the petitioner is unlawful. If so, what relief of service benefits the petitioner is entitled to? | OPP |
| 2. Whether this court has no jurisdiction to adjudicate upon the reference. | OPR |
| 3. Whether the petitioner is not eligible for regularization. | OPR |

4. Relief.

10. I have heard the ld. counsel/authorized representative for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

Issue No.1 : Yes
 Issue No.2 : No
 Issue No.3 : No
 Relief. : Partly allowed as per operative part of the award.

REASONS FOR FINDINGS**ISSUES NO. 1 & 3**

11. Both the issues are being taken up together for discussion as they are co-related and intermingled.

12. The short and simple case emerging out from the pleadings is that the petitioner had indeed completed 10 years of continuous service with 240 days in each calendar year in the year 2000. The said factum is clearly decipherable from the mandays chart placed on record by the respondent and the deposition of the Executive Engineer who has appeared as RW1. He has categorically admitted that the petitioner had completed 10 years of regular service as on 31.12.2000.

13. The respondent has also tendered in evidence a copy of office order dated 25.3.2008 by the Executive Engineer whereby the petitioner has been ordered to be regularized retrospectively w.e.f. 1.1.2002.

14. The respondent has further tried to portray in the reply that the petitioner had not completed eight years of continuous service as on 31.12.1999 as per the requirements of the policy dated 29.8.2002 and as such the services of the petitioner were not regularized. By the time the approval was received through Engineer-in-Chief on 11.9.2002 the petitioner had become overage by virtue of a Govt. Notification dated 10.5.2001 and as such even while ordering his regularization no formal orders were issued in this behalf. The respondent has not placed on record any of the policies. However while going through the record it transpired that in partial notification of the policy issued vide department letter dated 8th of July, 1999, the State had decided that the daily wagers of all the departments/boards and corporations who had completed eight years of continuous service (with the minimum of 240 days in a calendar year) as on 31.3.2000 will be eligible for regularization. The said policy further envisaged that initially the workman will be considered for only workcharge category and thereafter they would be regularized against the vacant post or by creation of fresh post in the category.

15. The mandate of the policy was thus clear and unequivocal. The workman had to be granted the status of work-charge after the completion of mandatory period i.e. eight years as on 31.3.2000. It was not obligated that the vacancies had to be in place at that time, even per the policy. The department was directed to create a vacancy where there was none. Factually the petitioner was eligible as per the said policy in the year 2000 as he had completed eight years as on 31.3.2000. Thus in any case the petitioner was required to be regularized atleast w.e.f. 1.4.2001.

16. During the course of arguments the respondent had further tried to highlight that the since the retirement age of Class-IV government servant had been reduced to 58 years after 10.5.2001 vide notification of even date, placed on record, and as such the petitioner was not liable to be regularized as the approval for his regularization has been on 1.1.2002. I am afraid this argument of the respondent's cannot be sustained, firstly because the notification dated 10.5.2001 placed on record clearly shows that only those Class-IV government servant appointed on or after the date of the said publication were to retire from service after attaining the age of 58 years. The notification thus was not to be applicable to workmen who were already appointed prior to the said notification. In that case the notification had no effect on the case of the petitioner. Moreover the approval having come on 25.3.2008 would not mean that the date of regularization would have 1.1.2002, but it had to be from the date the petitioner was eligible to be regularized. In the present case w.e.f. 1.4.2001. The petitioner having attained the age of superannuation on 31.12.2002 if nothing else he was atleast entitled to the promotion notionally w.e.f. 1.4.2001, though with all pecuniary benefits arising thereto.

17. The delay in getting approval will and cannot mean that the benefit due to the petitioner could have been curtailed arbitrarily. The respondents had to fix the regularization of the petitioner as per the eligibility criteria and his existing seniority. Admittedly he had completed 10 years of continuous service (with 240 days in each calendar year) on 31.12.2000. As per the policy he was thus required to be regularized w.e.f. 1.4.2001. The delay in getting approval was an administrative lapse and it cannot be fastened on the petitioner. Even as per order dated 25.3.2008 the regularization has been ordered retrospectively, if that is so it had to be done from the date the petitioner became eligible as per the guidelines of the policy enshrined by the state itself, and in the present case w.e.f. 1.4.2001.

18. The issues are accordingly decided in favour of the petitioner. It is held that the petitioner was entitled to be regularized w.e.f. 1.4.2001. The action to the contrary taken by the respondent is unjustified and illegal. The direct fall out of the same is that the petitioner had to be promoted w.e.f. 1.4.2001. Though he was entitled to pecuniary benefits w.e.f. the said date alone as the regularization has been ordered retrospectively on 25.3.2008.

ISSUE NO. 2

19. Nothing has been brought to my notice that as to how this court has no jurisdiction to adjudicate upon the reference. The issue is accordingly decided against the respondent.

RELIEF

20. For all the foregoing reasons discussed hereinabove, the reference is partly allowed. As a sequel thereto the petitioner ordered to be regularized w.e.f. 1.4.2001 notionally. He shall only be entitled to pecuniary benefits arising from the regularization w.e.f. 1.4.2001 till his superannuation as on 31.12.2002 as the regularization had been ordered only on 25.3.2008. The reference is answered in the aforesaid terms. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 19th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 297/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Smt. Malka Devi W/o Shri Khayali Ram, R/o Village Ratkail, P.O. Sajayo Piplu, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Malka Devi W/o Shri Khayali Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First

come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
2. Whether the petition is not maintainable, as alleged. OPR
3. Whether the petition suffers from the vice of delay and laches. OPR
4. Whether the petitioner is guilty of suppressio veri. OPR
5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. OPR
6. Relief.

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services.

Issue 2 :	No
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(1) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(2) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter- alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with. 25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008

(Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of her affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of her illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1271/07-274 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may

have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 99/2005
Instituted on : 13.7.2005
Decided on : 17.5.2010.

Shri Malkit Singh S/o Shri Badhawa Ram, R/o Village Bhapoo, Tehsil Indora, Distt. Kangra, H.P.

.....Petitioner

Vs

The Managing Director, M/s. Sood Steel Industries Pvt. Ltd. Kandrori, Tehsil Indora, Distt. Kangra, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. Vinay Soni, Adv.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the action of Management of M/s. Sood Steel Industries Pvt. Limited, Kandrori, Tehsil Indora, District Kangra, H.P. to terminate the services of Shri Malkit Singh S/o Shri Badhawa Ram workman w.e.f. 14.1.2004 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner is that he was appointed as a Electrician in M/s. Durga Steel, Re-Rolling Mill on 1.1.1979. He continued to work as such till the year 1990. Thereupon the management had changed the name of the firm/factory to M/s. Sood Steels India Pvt. Limited in the year 1998. The petitioner continued to work in the said unit till 13.1.2004.

3. His services came to be terminated on 14.1.2004 without complying with the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). He had raised the dispute in respect of his termination in April, 2004.

5. Further, per the applicant, on 14.1.2004 when he had gone to the factory he had been stopped at the gate and not allowed to resume his work. He had completed more than 240 days in each calendar year. Since no notice had been issued to him his termination was bad, being in violation of Section 25-F of the Act. The respondent had also failed to abide by the principle of 'last come first go' and as such was violative of the provisions of Section 25-G of the Act.

6. The petitioner thus sought setting aside of his termination. He further sought reinstatement along with all consequential benefits.

7. While contesting the claim the respondent inter alia raised the preliminary objections vis-à-vis maintainability, locus standi and willful relinquishment of service by the petitioner.

8. On merits it was the contention of the respondent that the services of the petitioner was never terminated but he had himself voluntarily resigned from service. There was, as such no question of noncompliance of the provisions of the Act. The petitioner after having resigned from the service had started an Electrician Shop in the name and style of Malkiat Electrical Works. Repeated requests were made to the petitioner to resume service but he refused to do so. Similar in the presence of the Labour Commissioner also the petitioner was requested to resume job but he refused to rejoin his service.

9. While filing rejoinder the contentions of the reply were denied and those taken in the statement of claim were reaffirmed.

10. On 12.10.2006 the following issues came to be framed:

- | | | |
|----|--|-----|
| 1. | Whether the dis-engagement from the service of the claimant by the respondent is in accordance with law? | OPP |
| 2. | If the above issue is in affirmative to what relief the claimant is entitled to? | OPP |
| 3. | Whether the claimant willfully abandoned his job? If so, its effect? | OPR |
| 4. | Relief. | |

11. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:—

- | | |
|-----------|---|
| Issue 1 : | No |
| Issue 2 : | Yes |
| Issue 3 : | No |
| Relief : | Allowed as per operative part of the award. |

REASONS FOR FINDINGS

ISSUES NO. 1, 2 and 3

12. All the three issues are being taken up together for discussion as they are co-related and intermingled.
13. It is not denied by the respondent that the petitioner was not working as an Electrician with them since the year 1979 and had not completed the requisite 240 days, required under Section 25-B of the Act.

13. The bone of contention inter-se parties relate to the termination of the petitioner in derogation to the provisions of the Industrial Disputes Act, more particularly the provisions of Section 25-F. It is not disputed by the respondent that notice had not been issued to the petitioner while terminating his services. For, it is the case of the respondent that the provisions of the Act were not required to be complied with because the petitioner had himself resigned and thereupon abandoned job. The perusal of the entire record whether ocular or documentary does not talk of or highlight any resignation, propounded by the respondent. There own witness Manohar Lal (PW2), who is working as an Accountant with the respondent, in his evidence has categorical deposed that the petitioner had not tendered any resignation letter nor has purported resignation letter been placed on record by the respondent. The respondent had again examined the same Manohar Lal as RW1. While appearing as RW1 this witness has tried to portray that the petitioner had abandoned job on his own. But, again there is nothing on record to show that the petitioner had actually abandoned job. Even in his cross-examination RW1 has deposed that they had only verbally asked the petitioner to report back to duty.

14. The respondent's witness had further admitted in his crossexamination that another electrician has been employed by the company. It is thus apparent that even after the termination of the petitioner the respondent has re-engaged workman in the same grade. The petitioner having worked with the respondent since 1979 and having been

retrenched had a right to be offered the same post by virtue of the requirement of the provisions of Section 25-H of the Act. The same was also not done in the present case.

15. Admittedly no notice was issued to the petitioner while dispensing with his services on 14.1.2004. The plea of the petitioner having resigned cannot be accepted as there is no evidence on record to remotely suggest so. Had the petitioner resigned, the resignation letter would have been placed on record by the respondent. None was put on record. Rather there own witness who has appeared as PW2 and RW1 has categorically denied that the petitioner had sent any resignation letter. Not only this while appearing as RW1 he was on a totally different plane and has rather raised a new plea, that of abandonment. The two contradictory stands taken by the respondent talks volumes about the conduct of the respondent. The contradictory pleadings and evidence on record raises a serious doubt about the plea set up by the respondent. It cannot be believed even otherwise. Abandonment has also not been proved on record. There is no documentary proof even as regards abandonment.

16. Thus, seeing to the totality of the circumstances discussed above the only inferences which can be drawn is that the services of the petitioner was dispensed with without following the provisions of Section 25-F of the Industrial Disputes Act and as such the same was void-ab-initio. Not only this there is sufficient evidence on record to show that the respondent had engaged a fresh hand as an electrician and had clearly violated the provisions of Section 25-H of the Act. The action of the respondent is unsustainable on all scores.

17. Consequently the termination of the petitioner is held to be illegal. The said action of the respondent is set aside and quashed. The petitioner is ordered to be re-engaged as an Electrician forthwith.

18. Apparently the petitioner had opened his own electrical shop, though no conclusive evidence has been placed on record by the respondent as the onus was on them, but still even assuming if it was so the petitioner could not have remained idle after having been terminated by the respondent. The action of the respondent being in blatant violation of the Industrial Disputes Act, he is held entitled to 25% back-wages from the date of his illegal termination. The three issues are decided accordingly.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed being in violation to the provisions of Industrial Disputes Act. He is ordered to be reinstated forthwith with 25% back-wages and continuity in service from the date of his illegal termination. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 17th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 104/2004
Instituted on : 5.7.2004
Decided on: : 1.5.2010.

Shri Man Chand S/o Shri Bhagnu, R/o Village Biyala, P.O. Lasooi, Tehsil Charah, Distt. Chamba, H.P.

.....Petitioner

Vs

The Divisional Forest Officer, Forest Division, Chamba, Distt. Chamba, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.R. Bhardwaj, AR.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Shri Man Chand S/o Shri Bhagnu, Ex. daily wages Chowkidar by the Divisional Forest Officer, Forest Division, Chamba, Distt. Chamba, H.P. w.e.f. 1.10.1998 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief and service benefits Shri Man Chand workman is entitled to?”

2. The short and simple case set up by the petitioner is that he was engaged as Chowkidar on daily wages basis by the respondent in Tikri Beat in the year 1998. He continuously worked as such till 30.9.1998. His services were dispensed with on 1.10.1998 verbally.

3. The petitioner had completed 240 days in each calendar year. The action of the respondent in terminating his services were thus violative of the provisions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act).

4. It is further the case of the petitioner that the respondent had retained the services of Shri Chhaju Ram, Negi Ram, Gurudei and Sh. Biru etc. who were junior to the petitioner. They are still working with the department. The respondent thus has violated the principle of ‘Last Come First Go’. Their act as such is violative of the provisions of Section 25-G of the Act.

5. The petitioner thus seeks to set aside his termination. He further seeks reinstatement and regularization thereof having completed 10 years as on 1.1.1999.

6. While contesting the claim the respondent had averred that the petitioner was not appointed as Chowkidar. He was however appointed as daily rated mazdoor on various forestry operations in March, 1989 and continued to work as such till December, 1997 with the respondent. The frequent breaks in his services were an outcome of his own sweet will.

7. Even otherwise forestry works are generally seasonal in nature and consigned to particular period only. Therefore, per the respondent, the termination of the applicant was not bad in the eyes of law.

8. Further per the respondent the regularization of daily wager was made as per the policy of the Government wherein it was clearly laid that the workers who have rendered eight years of continuous service with minimum of 240 days in each calendar year as on 31.3.2000 shall be considered for regularization. Since the petitioner had never put in 240 days in any of the calendar years, he could not be regularized. It is again reiterated by the respondent that since the petitioner was engaged as daily rated mazdoor hence his termination/verbal retrenchment was not bad in law. It is also averred that the applicant disengaged himself and did not make himself available for work.

9. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those of the statement of claim.

10. On the basis of the pleadings on record my Ld. Predecessor framed the following issues for determination:

1. Whether the services of the petitioner were terminated w.e.f.1.10.1998, without complying the provisions of Industrial Disputes Act, 1947, in an improper unjustified manner, as alleged? OPP
2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled? OPP
3. Whether the petitioner was not given breaks by the department and he remained frequently absent at his own will as is evident from Annexure R1 if so its effect? OPR
4. Whether the respondent engaged the petitioner for seasonal work subject to availability of funds and work if so its effect? OPR
5. Relief.

11. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS**ISSUES NO. 1, 2 and 4**

12. Since all three issues are co-related they are being taken up for discussion together.

13. At the very outset it would be apposite to state that about seven opportunities were granted to the respondent to lead evidence but no endeavour was made by them to lead any evidence whatsoever.

14. In the reply it was sought to be portrayed that the forestry works are generally seasonal in nature but there was no category stance taken by the respondent that the petitioner was a seasonal worker. It was however averred by the respondent that he was engaged on muster rolls in Range Office Tikri w.e.f. 3/89 and remained working till 12/97 with frequent breaks at own his will. It was however the contention of the respondent that since the applicant was engaged as a daily rated mazdoor, hence his termination/verbal retrenchment was not bad in the eyes of law. Half heartedly in a one liner it was also averred that the applicant disengaged himself and nor made himself available for work. The respondent had placed on record annexures R-I and R-II to show that the petitioner had not completed 240 days and as such could not be regularized as per the policy of the State.

15. The petitioner while appearing as PW1 has reiterated that he had completed 240 days. He is admitted that he was working in the nursery. In his cross-examination he has further stated that he had been engaged for 12 months in the year 1997 and even in 1998 he had worked with the respondent for about four months in lieu whereof he had been paid wages but his attendance had not been marked by the respondent. He denied that he had left the job on his own in the year 1997.

16. The petitioner had also placed on record the seniority list of daily waged workers in respect of Tikri range and Chamba Forest Division.

17. No doubt the perusal of the evidence on record shows that apparently the petitioner had not completed 240 days in the 12 calendar months preceding his termination as reflected by annexure R-1. It however only shows the mandays of the petitioner till December, 1997. The claim of the petitioner is that he had been dis-engaged on 1.10.1998. The respondent has very feebly averred that he had left work himself but has not specified when he had abandoned job. Nor there is any documentary evidence on record corroborating the version of the respondent.

18. The contention of the respondent that the forestry work is seasonal in nature cannot be disputed but it is nowhere their case that the petitioner was engaged for seasonal operations. Nor has any one has appeared in the witness box to contend so. This assertion of the respondent is belied from the seniority list of Chamba Forest Division placed on record which shows that the many people had been employed in plantation of nurseries not only at Tikri range but in other ranges in Chamba. In fact Chhaju Ram S/o Udna has not only been employed in a nursery but also stands regularized with the respondent. It cannot thus be inferred that the petitioner and other workmen had been engaged for seasonal work by the respondent. Their averment is falsified by their own record. The seniority list of daily wagers working in respect of Tikri range further corroborate the said version as by and large the workers including Chhaju Ram have completed more than 240 days in almost all the years.

19. No doubt from the evidence on record it is clear that the petitioner has not completed 240 days but the fact remains that he was not a seasonal worker. He had even completed more than 200 days in the year 1994 and 1995. Even if the petitioner was not entitled to the protection of the provisions of Section 25-F of the Act. It is fact that the he had come to be engaged in Tikri range in the year 1989. He continued to work regularly till 1997. Even if he had not completed 240 days in each calendar year the petitioner however was senior to many workmen appointed after his engagement. One of the example is that of Chhaju Ram. As per the requirement of the Section 25-G whenever any workman is to be retrenched and he belongs to a particular category, the employer was ordinarily to retrench the workman who was the last person to be employed in that category. The principle of 'last come first go' as enshrined under section 25-G of the Act is not only confined only to workman who were in continuous service and having completed 240 days in each calendar year but its benefit accrues to all the workmen. Even if the petitioner had not completed 240 days his retrenchment was to proceed strictly on the basis of 'last come first go'. It has not been done in the present case. Even otherwise as per the respondent the termination/verbal retrenchment of the applicant is not bad in law. Per them the services of the petitioner could have been done away with, it since he was a daily rated mazdoor. In fact the respondent department was totally on a misconceived plane atleast in respect of the applicability of the provisions of the Industrial Disputes Act. Seeming they did not have any idea about the provisions of the Act and what was required to be done in such a situation. Thus, I am constrained but to hold that the termination of the petitioner was atleast in violation of the provisions of Section 25-G of the Act, it not the provisions of Section 25-F. The action of the respondent thus is not legally tenable. It is accordingly set aside. The issues are decided accordingly.

19. The action of the respondent is thus liable to be quashed and set aside. It is ordered accordingly. The petitioner shall be reinstated in service. He shall entitle to all consequential benefits including continuity of service and seniority, except the back-wages. There is no whisper in the deposition of the petitioner that he was not gainfully employed after his retrenchment as such he is not entitled to any back-wages.

ISSUE 3

20. As already discussed above the respondent has neither proved the abandonment on behest of the petitioner nor is there any evidence produced on record to suggest that the petitioner used to remain absent. There is nothing on record to show that the petitioner had been willfully absents from job. The perusal of annexure R-1 in itself does not reveal that the petitioner had been absents himself of his own free will. Merely because his mandays are less cannot be a ground to infer such. More so because the petitioner has deposed in his testimony that at times his presence was not marked the conduct of the respondent becomes suspect. Further more there is no rebuttal to the said factum. The issue is thus held accordingly against the respondent.

RELIEF

21. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed being in violation to the provisions of Sections 25-G of the Act. Since the petitioner is dead, having passed away on 16.10.2006 the legal representatives of the deceased workman shall be entitled to consequential benefits if any, arising from the seniority and continuity granted to him, except back-wages. In the peculiar circumstances arising on the record, keeping in view the death of the workman and his termination having been held to be in violation of the provisions of Section 25-G of the Act and more so the back-wages having not been granted to him, the petitioner/workman would have been entitled to seniority and continuity alone entitling him atleast to some benefits on the basis of the seniority. Because of his death the relief cannot be enjoyed by the deceased workman. Consequently in lieu of reinstatement the compensation amounting to Rs.50,000/- deserves to be paid to the dependants of the deceased workman by the respondent. It is ordered accordingly. The same shall be paid to the dependants of the deceased petitioner within 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 1st day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 180/2007
Date of Institution : 1-11-2007
Date of decision : 1-6-2010

Sh. Man Dass s/o Shri Jimi Ram, Village Dhamar, P.O. Khun, Tehsil Ani, District Kullu, H.P.

....Petitioner

Versus

The Executive Engineer, H.P.P.W.D., Nirmand, District Kullu, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Laxman Thakur, adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Man Dass s/o Shri Jimi Ram workman by the Executive Engineer, H.P.P.W.D., Division, Nirmand, District Kullu, H.P. w.e.f. 1-5-1999 without complying the

provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

2. While filing the statement of claim the petitioner avers that he had initially approached the Hon'ble Administrative Tribunal by way of an original application bearing O.A.No.1575/99 which was dismissed for want of jurisdiction. Thereupon the petitioner has raised the Industrial dispute and as such the petitioner is before this Court.

3. The facts narrated by the petitioner in brief are that he was appointed by the respondent in July 1998 and he continued to work as such till May 1999.

4. The petitioner reproduced his mandays as under:-

Year 1998

Sr. No.	Month	Muster roll No.	Man Days
1.	7/98	93	30
2.	8/98	114	31
3.	9/98	136	27
4.	10/98	159	23
5.	11/98	186	30
6.	12/98	213	31
		Total	172 days.

Year 1999

1.	1/99	Nil	
2.	2/99	263	28
3.	3/99	287	31
4.	4/99	25	29
		Total	88 days

ABSTRACT

Year	Man Days
1998	172 Days
1999	88 Days

5. Further per the petitioner the department had perennial work and the respondent has even retained persons junior to the applicant. As per the petitioner the respondent had not issued a notice to him as required under the provisions of section 25-F. Moreover persons junior to him were retained, which was in violation of section 25-G and 25-H of the Act. Thus, his termination was illegal and liable to be set aside and quashed. He sought reinstatement along with all consequential benefits.

6. While filing the reply the respondent inter-alia raised the preliminary objection vis-à-vis maintainability, delay and laches, and material suppression of facts.

7. On merit it was admitted by the respondent that the nature of work in the department was perennial. However the petitioner had not completed 240 days in the calendar year. The service of the petitioner were never terminated, he left his work on his own sweet will. Per the respondent no junior persons to the petitioner had been retained by them. The respondent thus sought dismissal of the claim

8. While filing the rejoinder the averments in the reply were controverted and those in the claim were reiterated.

9. Based on the aforesaid pleadings my Ld. Predecessor had framed the following issues for determination:

- Whether the services of the petitioner were terminated by the respondent w.e.f. 1.5.1999OPP.
- If the above issue 1 is proved, whether the termination of services of the petitioner by the respondent is unlawfulOPP.
- Whether the petitioner's claim is not maintainable.. OPR.

4. Whether the claim petition suffers from the vice of delay and laches
5. Relief.

...OPR.

10. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus;

Issue No. 1	Yes
Issue No.2	Yes
Issue No.3	No
Issue No.4	No
Issue No.5	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE No. 1 & 2

11. Both the issues are co-related and intermingled. Further to avoid repetition the issues are being discussed together.

12. Mandays of the petitioner reflected in the statement of claim are not in dispute. The same have been also placed on record by the respondent vide Ex. RW1/A. As per the undisputed figures the petitioner was working with the respondent since July, 1998 and his services were terminated as such on April 2, 1999. In the instant case the petitioner in these 10 months has already put in 260 days with the respondent. The respondent has taken a stand that the petitioner has not completed 240 days in each calendar year. The said plea cannot be countenanced. It is by now well settled that continuous service as contemplated under Section 25-B of the Industrial Dispute Act is to be reckoned in the 12 calendar months preceding the date of termination. It is not that 240 days had to be reckoned separately in each calendar year. On this the respondent had misinterpreted the provisions of the Act and resultantly given a complete go by to the statutory provisions of the Act.

13. The Executive Engineer while appearing as RW1 has gone on record to depose that the petitioner has not completed 240 days in every year. Thus the statutory requirement of the Act has not been understood by the respondent in the right perspective. On the basis of this wrong interpretation the respondent has miserably failed to resort to the basic requirement of the Act.

14. The petitioner having completed 240 days preceding his termination the respondent was duty bound to have followed the provisions of Section 25-F. Any departure thereupon was and is fatal to the respondent.

15. The respondent have further tried to portray that the petitioner had abandoned job. There is no evidence worth the name in its support except the bald statement of the Executive Engineer, while appearing as RW1. Neither any show cause notice is stated to have been issued to the petitioner to explain as to why he was not undertaking his work nor is their evidence that the petitioner had no intention to resume work. Even assuming, that it was so, absence from duty must be held to be "misconduct". Termination of his service employee on the ground of misconduct cannot be resulted to without holding an inquiry or complying with the provision of the Act i.e. by way of termination. The action of the respondent thus had to be by way of formal retrenchment of the petitioner even in case he abandoned the job. It is not inferably from record.

16. As a sequel thereto there is no escape from the fact that the termination of the petitioner was illegally and unlawful, being in violation of the provisions of section 25-F of the Act. Consequently the termination of the petitioner w.e.f. 1-5-1999 is set aside and quashed.

17. The petitioner while appearing as PW1 has failed to discharge his initial onus that he was not gainfully employed as such I do not intend to order payment of back wages to the petitioner. Both the issues are decided accordingly.

Issue No. 3

18. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

Issue 4

19. The provisions of the limitation Act do not strictly apply to the dispute arising under the Act. Nonetheless the claim may be categorized to be a stale claim, if the right of workmen has become stale or died its own

death. In the case in hand, immediately after his termination the petitioner had approached to the Hon'ble Administrative Tribunal for the redressal of his grievances. The said original application came to be dismissed on December 3, 2004 with the liberty to approach the appropriate authority under the provisions of the Act. At the best it was a choice of the wrong forum. Thereafter the petitioner took recourse to the provisions of the Act. It cannot be said that the claim preferred by the petitioner was stale.

20. Even if the provision of the limitation Act had been applicable the petitioner would have got allowance even for having approached a wrong forum. Thus it cannot be said that the petitioner would have lost the right and the remedy because of the wrong choice of forum. Issue is accordingly decided against the respondent.

RELIEF

21. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 1-5-1999 is set aside and quashed. He is directed to be reengaged forth with, along with consequential benefits relating to seniority and continuity of service from the date of his termination, except back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room. Announced in the open Court today this 1st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala,
H.P.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
 CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 82/2005
Instituted on : 18.6.2005
Decided on : 28.5.2010.

Shri Man Singh S/o Shri Med Ram, R/o Village Dhar, P.O. Jaidev, Distt. Mandi, H.P.

.....Petitioner

Vs

The Executive Engineer, I&PH Division, Sunder Nagar, Distt. Mandi, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. L.B. Sharma, adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy. D.A.

AWARD

1. The reference has been received from the appropriate Govt. seeking adjudication of the following term:

“Whether the termination of services of Shri Man Singh S/o Shri Med Ram workman by the Executive Engineer, I&PH Division, Sunder Nagar, District Mandi, H.P. w.e.f. 17.12.2002 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and compensation the above aggrieved workman is entitled to?”

2. The workman whose services are alleged to have been illegally terminated died during the course of the proceedings. So much so the statement of claim came to be preferred by the LR's of the deceased Man Singh.

3. It is the case of the claimants that there predecessor-in- interest, late Shri Man Singh was engaged as a beldar by the respondent in the year 1980. The respondent uses to give him fictional breaks and never allowed him to complete 240 days in a calendar year. However, during the year 1995 to 2002 the deceased had completed 240 days in each year.

4. It is also the case of the petitioners that the deceased Man Singh was the senior most employee. The juniors were allowed to complete 240 days whereas the services of the deceased was terminated orally without assigning any reason. The termination was sought to be declared as wrong and illegal w.e.f. December, 2002.

5. While contesting the petition the respondent raised a preliminary objection that the petition is not maintainable. Per the respondent the deceased petitioner was engaged by virtue of an interim order passed by the Hon'ble Administrative Tribunal on 8.9.1995 in the O.A. (M) No.722/95. Eventually on the dismissal of the original application the services of the petitioner was terminated. The reference is with respect to the dis-engagement of the petitioner w.e.f. 17.12.2002. It was a consequence of the dismissal of the original application.

6. On merits it is averred by the respondent that deceased workman had worked on daily wages intermittently w.e.f. 4/85 to 7/89. He abandoned the job of his own on 21.7.1989. The aforesaid workman remained absent for about eight years and filed an original application bearing No.722/95 before the Hon'ble Administrative Tribunal. By virtue of an interim order the services of the workman was recommenced. The said original application came to be dismissed for want of jurisdiction on 21.7.1989. Thereafter the discontinuation of the petitioner w.e.f. 17.12.2002 does not attract the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) but is the result of dismissal of the said original application.

7. Rejoinder was not filed. On the pleadings of the parties, the following issues were framed for determination:

- | | | |
|----|---|-----|
| 1. | Whether the disengagement from the service of the petitioner by the respondent is proper and justified? | OPP |
| 2. | If the above issue is proved in affirmative to what relief of service benefit the petitioner is entitled to the respondent? | OPP |
| 3. | Whether the petition is not maintainable before this Court? | OPR |
| 4. | Relief. | |

8. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

Issue 1 :	No
Issue 2 :	Yes
Issue 3 :	No
Relief :	Allowed as per operative part of the award.

REASONS FOR FINDINGS

ISSUES NO. 1 and 2

9. Both the issues are being taken up together for discussion as they are intermingled and co-related.

10. The reference in question relates to the dis-engagement of the deceased Man Singh w.e.f. 17.12.2002. The perusal of the mandays chart placed on record indisputably shows that from January, 1996 onwards, the deceased workman had completed 240 days in each year till 17.12.2002.

11. In fact it is not even denied by the respondent. There specific and simple case is that since the services of the deceased have been continued in pursuance to the interim directions of the Administrative Tribunal, the provisions of the Industrial Dispute Act are not applicable to the case in hand. The termination of the deceased workman was the direct outcome of the dismissal of original application. It is the pleaded case of the respondent.

12. In furtherance thereto Assistant Engineer Shri Harsh Sharma has appeared as RW1. He deposed that the deceased had assailed his abandonment w.e.f. 21.7.1989 by filing an O.A. (No.722/95) and by virtue of the interim order he had come to be re-engaged. Since the respondent had categorically taken a stand that the deceased had abandoned his job on 21.7.1989 the said factum remained undecided and the original application came to be dismissed for want of jurisdiction. As such the contention of the department regarding voluntarily abandonment on behalf of the deceased was upheld. He further deposed that since the engagement of the petitioner was dependant upon an interim order the dismissal of the O.A. entailed the termination of the deceased and as such the provisions of the Industrial Dispute Act are not applicable in the case.

13. Though no order worth the name showing that the deceased was re-engaged on the basis of the interim order is on record. Nor has the final order passed by the Administrative Tribunal seen the light of the day. Even

if it is assumed that the factual narration by the respondent is correct, though the pleadings and the evidence are at variance, but, nonetheless it is an admitted fact that the original application in question came to be dismissed on the grounds of jurisdiction. It is again admitted by the RW1 in his cross-examination. Per him the said petition came to be dismissed on 7.1.2000.

14. It is not disputed that the services of the deceased came to be terminated on 17.12.2002. Even if the preceding 12 months of the alleged dis-engagement are kept in view, the deceased workman had completed more than 240 days, even after the dismissal of the original application by the Hon'ble Tribunal. A vested right had come to be accrued in favour of the deceased as per the requirements of the Industrial Dispute Act. Not only this one thing which clearly emerges from the pleadings and the evidence on record is that there was no decision on merits by the Administrative Tribunal. The original application had come to be dismissed on a technical plea i.e. want of jurisdiction. It cannot thus be inferred that the contention of the respondent had come to be upheld by the Tribunal while disposing off the original application. The approach of the respondent in this behalf is totally misconceived. Since the original application had come to be dismissed on technicalities the continuance of the deceased in service with the respondent and that too continuously for a period of 240 days in each year had vested a right in him as enshrined under the provisions of Section 25-F, as far as the retrenchment was concerned. The respondent thus ought to have resorted to the provisions of the Section 25-F of the Industrial Disputes Act. As discussed hereinabove it was all the more incumbent upon the respondent to do so because even after the dismissal of the O.A., the deceased continued to work as such for atleast 12 calendar months preceding his termination.

15. Another aspect which requires to be highlighted is that the similar situated persons have come to be retained by the respondent, though by virtue of the orders of this Court. If that was so, the deceased was also entitled to the same treatment. More so keeping in view the fact that the respondent is an instrumentality of a welfare State. It could not have acted in an arbitrary manner when the other similar situate persons had been retained, even if in pursuance to dictate of any court. The benefit should have been extended to all without any discrimination. The respondent had accepted the earlier decision of this Court without any demur. I am thus constrained but to void that the respondent have failed to respect the mandate of the Industrial Disputes Act and as such the disengagement of the deceased Man Singh was in violation of the statutory provisions of the Industrial Disputes Act. The action of the respondent is thus liable to be set aside and quashed. Unfortunately, because of the demise of the workman's reinstatement cannot be ordered. There is nothing on record to remotely suggest that during the forced idleness of the deceased he was not gainfully employed and as such no effective relief can be granted to the deceased Man Singh. Nonetheless, the respondent is liable to be burdened with compensation for having violated the mandatory provisions of the Industrial Disputes Act and accordingly are burdened with compensation amounting to Rs.50,000/- to be paid to the present petitioners.

ISSUE 3

16. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference in not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

17. For the foregoing reasons discussed hereinabove while setting aside the termination of the deceased workman Man Singh. The respondent is burdened with compensation for having violated the mandatory provisions of the Industrial Disputes Act and accordingly the petitioners are held entitled to compensation amounting to Rs.50,000/-. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 28th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 648/2008
Date of Institution : 29.10.2008
Date of decision : 20.5.2010

Shri Manoj Kumar S/o Shri Bhuri Singh, R/o Village Kalswai, P.O. Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Manoj Kumar S/o Shri Bhuri Singh by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on December, 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after

following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- | | |
|------|--|
| (i) | a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948); |
| (ii) | a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952); |

(iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made

should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on December, 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was

considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.9322 dated 15.10.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated September 5, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 281/2009
Date of Institution : 29.5.2009
Date of decision : 30.4.2010

Shri Mansa Ram S/o Shri Chhiteru Ram, R/o Village Chunehad, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Mansa Ram S/o Shri Chhiteru Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination. 6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been

indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
 - (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
 - (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the

administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred “*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*” There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can

be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1278/07-281 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 182/2001
Instituted on : 20.9.2001
Decided on : 11.6.2010.

Shri Mast Ram S/o Shri Prabh Dayal, R/o VPO, Sherpura, Tehsil Dalhousie, Distt. Chamba, H.P.

.....*Petitioner*

Vs

General Manager, Chamera Hydro-Electronic Project, Khairi, Stage-I, Distt. Chamba, H.P.

.....*Respondent*

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.R. Bhardwaj, AR

For the Respondent : Sh. V.K. Gupta, AR

AWARD

1. By way of the present reference the appropriate government seeks a determination from this court on the following point:

“Whether the termination of services of Sh. Mast Ram S/o Shri Prabh Dayal, w.e.f. 13.4.1998 vide order dated 13.4.1998, by the General Manager, Chamera Hydro Electric Project, Stage-I, Khairi, Distt. Chamba, H.P. is legal and justified? If not, what relief of service benefits, seniority, back-wages and amount of compensation, the above workman is entitled to?”

2. In furtherance of the reference the petitioner while submitting the statement of claim contends that he was appointed as a beldar Grade-III in the pay scale 1100-1300 by the respondent in terms of the interim orders dated 13.1.1993 passed by the Hon’ble High Court of Himachal Pradesh in CWP No.488/91. In pursuance to the same the petitioner’s appointment letter was issued by the respondent and he joined duties on 26.2.1993.

3. Eventually the Writ Petition came to be dismissed as not maintainable and as sequel thereto the interim orders came to be vacated w.e.f. 20.12.1996.

4. The petitioner continued to work even after 20.12.1996 continuously in the same place and post with the respondent. However on 13.4.1998 the services of the petitioner was terminated vide a letter of the even date annexed along with the statement of claim as Annexure- P3.

5. The petitioner thus contends that the action of the respondent in not complying the provisions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) was illegal as neither any notice nor any amount was paid in lieu thereof. For want of notice neither any compensation amount was paid to him.

6. It is further the case of the petitioner that the respondent had appointed number of beldars in work-charge/regular cadre of the project even after the termination of the petitioner but he had not been offered any opportunity of reemployment and as such action of the respondent was also violative of the provisions of Section 25-H of the Act.

7. Furthermore, the petitioner was a land oustee of Chamera Hydro Electronic Project and the management had appointed number of such workmen whose acquired land was less than that of the petitioner. Not only this, there were even such workmen appointed by the management whose land has not been acquired at all as was stated by the Deputy Commissioner Chamba in his affidavit before the Hon’ble High Court of H.P. The petitioner was not employed gainfully after his illegal termination.

8. It was thus sought that the termination of the petitioner be set aside and quashed. He be ordered to reinstatement from the date of his illegal termination with all consequential benefits.

9. While contesting the claim the respondent inter alia raised the preliminary objections that the petitioner had not approached the Court with clean hands and had suppressed the material facts. The reference was bad in law for non-joinder of necessary parties and the reference being barred by virtue of orders dated 12.1.1999 passed by the Hon’ble Supreme Court of India. It is further contended by the respondent that the State of H.P. had acquired land for construction/operations and maintenance of the Hydro Project being run by the respondent. That for the purpose of welfare, settlement and rehabilitation of families of the land oustee and understanding had been reached inter se the State and the respondent to employ 700 persons in the project. It was further decided that the persons to be given employment by the respondent was to be identified and sponsored by District Revenue Authority.

10. It is not denied that the petitioner had approached the Hon’ble High Court by way of Writ Petition and by virtue of the interim orders passed by the Hon’ble High Court on 13.1.1993, the petitioner had been engaged by the respondent. The said Writ Petition came to be finally disposed of on 20.12.1996 for want of jurisdiction, with liberty to the parties to approach the Civil Court for the redressal of their grievances.

11. It is further the case of the respondent that they waited for considerable period, for the notice from the Civil Court and kept the action of disengagement of the petitioner pending so that there be no contempt of Hon’ble Civil Court, as it was expected that the petitioner’s may approach the Civil Court. When no notices were received by

the respondent and on further inquiry it transpired that no petition had been filed, the petitioner was disengaged from service vide letter dated 13.4.1998.

12. The petitioner is thereafter stated to have approached the Hon'ble Supreme Court by way of a SLP which came to be disposed of vide order dated 12.1.1999 wherein it was ordered that if any of the petitioners secure sponsorship within four weeks from the date of order, they shall be considered for employment by the respondent on priority basis. The petitioner had also filed a Civil Suit in the Court of Ld. Civil Judge, Dalhousie in the month of April, 1999. The reference is thus stated to be illegal and without jurisdiction.

13. That the petitioners were engaged temporarily in compliance with the interim orders of the Hon'ble High Court of H.P. and the disengagement of such persons after the vacation of the interim orders did not cast any obligation on the respondent to comply with the provisions of the Industrial Disputes Act. The petitioner is further stated to be outside the purview of the provisions of Section 25-H of the Act as they could have been employed only if sponsored by the District Revenue Authority. Since their names had not been sponsored they were not be liable to be engaged.

14. The petitioner in his rejoinder controverted the contentions of the respondent and reiterated the stand taken in the statement of claim.

15. On 25.5.2004 my Ld. Predecessor had framed the following issues for determination:

1. Whether the termination of services of the w.e.f. 13.4.1998 by respondent is illegal and unjustified? OPP
2. If the issue No.1 is not proved to what relief of service benefits, seniority, back-wages, amount of compensation, the petitioner is entitled to? OPP
3. Whether the petitioner has concealed material, as alleged? OPR
4. Whether the claim petition is not maintainable and bad for non-joinder of necessary parties in view of preliminary objection No.3. OPR
5. Relief.

16. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

- | | |
|--------------|--|
| Issue No.1 : | Yes |
| Issue No.2 : | Partly yes |
| Issue No.3 : | No |
| Issue No.4 : | No |
| Issue No.5 : | Partly allowed as per operative part of the Award. |

REASONS FOR FINDINGS

ISSUE NO. 4

17. The respondent has very vociferously urged that the present petition is not maintainable as the appropriate Government in the present case vis-à-vis the respondent is the Central Government. The reference by the State Government is not maintainable in the present forum.

18. The respondent would further contend that in view of a decision titled as Taj Din vs. Chief Engineer Incharge, Dulhasti Hydroelectric Project and Anr, the Ministry of Labour and Employment, Government of India had issued circular whereby the appropriate Government in respect of National Hydroelectric Power Corporation (NHPC) was held to be the Central Government. The respondent has also sought to place reliance on the judgment of the Steel Authority of India Limited and Ors. Vs. National Union Waterfront Workers and Ors. dated 30.8.2001 to buttress their argument that in relation to the NHPC the Central Government is the "appropriate authority".

19. The respondent had further placed on record a copy of the Gazette of India dated 5th of May, 2008 carrying a notification issued by the Ministry of Labour and Employment of the even date reading thus:

"GSIR.336 (E)- In exercise of the powers conferred by Section 39 of the Industrial Disputes Act, 1947 (14 of 1947); the Central Government hereby rescinds the notification of the Government of India in the Ministry of Labour published in the Gazette of India, Extraordinary, vide number S.O. 556(E), dated 3rd July, 1998, except as respects things done or omitted to be done before such rescission."

20. The Government of India vide the aforesaid notification has rescinded the earlier notification dated 3rd July, 1998 whereby the State Government had been declared to be the “appropriate Government” in relation to certain Central Public Sector Undertakings and their subsidiaries, corporations and autonomous bodies specified in schedule, which inter alia included the NHPC.

21. It would be apposite to first highlight and mention a few relevant facts at this stage. The Central Government in exercise of powers conferred in it under Section 39 of the Act had notified the State Govt. to be the “appropriate authority” in respect of certain Public Undertakings, Corporations and boards as per the schedule annexed along with vide notification dated 3rd July, 1998, the NHPC was one of them. In the year 2001 the Hon’ble Supreme Court in a judgment titled as Steel Authority of India and Ors vs. National Union Waterfront Worker held that the NHPC was a instrumentality of the Central Government under Article 12 of the Constitution of India. The judgment stopped short of saying that in the said case the appropriate Government would thus be the Central Government. Despite the aforesaid judgment the Central Government in its wisdom vide letter dated 19th of April, 2002 (Annexure PB filed along with the reply to the application dated 13.9.2007 in respect of maintainability) clarified that in view of the Steel Authority of India’s judgment the powers of appropriate Government except under Section 25-L(b) of the Industrial Disputes Act, 1947 will be vested with the State Governments for the CPSU’s its subsidiaries/corporations specified from Serial No.1 to 86 in the schedule annexed to the notification dated 3.7.1998. It would be relevant point out that the name of the NHPC figures at serial no. 86th in the schedule. Admittedly thereafter Taj Din case on the basis of which the Ministry of Labour had again issued a circular on 3.5.2007 wherein the Central Government was held to be the appropriate authority. The letter dated 30.5.2007 being merely clarificatory in nature does not effect the statutory provisions of the Act and the notification issued thereupon. However since the earlier notification dated 3rd July, 1998 stands rescinded w.e.f. 5th of May, 2008, the appropriate Government’s in respect of NHPC w.e.f. the said date would be the Central Government. Thus only after 5th of May, 2008 the Central Government is the appropriate authority in case of the NHPC.

22. It is by now well settled with the operation of law is prospective unless it is ordered to be retrospective in nature. Till 5th of May, 2008 as is clear from the notification dated 3rd July, 1998 and as per the schedule annexed thereto the power of the appropriate authority had been delegated to the State by the Central Government. The present reference relates to year 2001 and as such the “appropriate Government” in the present case had to be the State Government. It is thus clear that all the references pending and made by the State Government as an “appropriate authority” till 5th May, 2008 are maintainable before this Court. Though any reference thereafter shall not be maintainable as the appropriate authority after 5th of May, 2008 is the Central Government. The issue is accordingly decided against the respondent and in favour of the petitioner.

ISSUE NO. 1

23. It is admitted that the petitioner had come to be appointed by the respondent by virtue of a interim order dated 13.1.1993 passed by the Hon’ble High Court in CWP No.488/1991. It is also not in dispute that the engagement was subject to the final outcome of the writ petition. It had been categorical made clear to the petitioner as per the appointment letter issued to the workman (EX. RW1/E).

24. The workman came to be engaged by the respondent on 18.2.1993. The said writ petition came to be disposed of on 20th December, 1996. Consequently the interim order also came to be vacated therein.

25. The respondent did not disengage the services of the workman immediately after the vacation of the stay and dismissal of the writ petition. After about one year and four months, on 13.4.1998 the workman were shown the door, though purportedly in view of the dismissal of the writ petition. Strangely it took one year and four months for the respondent to realize that the writ petition had been dismissed.

26. At this stage it would be relevant to reproduce the ground pleaded by the respondent for the said delay. Para 7 of the reply filed by the respondent read thus:-

“That after the said orders, respondents waited for the considerable period, in wait of the notice from the Civil Court, and kept the action of disengagement of the petitioners pending so that there may not be any sort of contempt of Hon’ble Civil Court as it was expected that the petitioner might have raised a petition before the Hon’ble Civil Court in conformity with Hon’ble High Court orders, but when no notice was received, respondent, of it’s own, enquired from the Civil Court, Dalhousie and ultimately after finding that there was no petition, the respondent relieved off the petitioner late Shri Suneet Singh of his engagement vide letter dated 13.4.1998 (Copy Annexure R-4)”

27. No doubt the appointment of the workman was conditional and subject to the final outcome of the writ petition, however having continued the workman for more than one year, the respondent was estopped from

resorting to the dismissal of the writ petitioner. The explanation given and discussed hereinabove also does not seem to be reasonable and prudent. It is seemingly fallacious. No doubt the petitioner could not have claimed equity in the facts and circumstances discussed above but after having been allowed to continue for more than a year and that too in "continuous service" the respondent rather lost the right to disengage the petitioner except after resorting to the provisions of the Industrial Disputes Act.

28. The question thus which arises for consideration is whether the action of the respondent in terminating the services of the workman after one year and four months after the vacation of the stay would amount to retrenchment as per the requirement of the Act or not. The word retrenchment is defined in Section 2 (oo). It read thus:-

"2(a) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-

(b) voluntary retirement of the workman; or

(c) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf."

29. Further per the provisions of Section 25-B of the Act "continuous service" has been defined to mean uninterrupted service for a period of one year, during the period of 12 calendar months preceding the date with reference to which calculations is to be made and the days required to be completed in the aforesaid period is 240 days in the present case.

30. Section 25-F further envisages that no workman employed in a industry who has been in "continuous service" for not less than one year under the employer shall be retrenched except as per the provisions enunciated therein.

31. The workman in the present case having completed the "continuous service" for more than one year as per the requirements of Section 25-B. The termination of the workman after more than one year the dismissal of the writ petition thus vested a right to the workman with respect the retrenchment as envisaged in Chapter VB of the Act.

32. Though, the Ld. authorized representative for the petitioner would contend that the engagement of the petitioner being in compliance to the interim orders passed by the Hon'ble High Court at best was adhoc, casual or temporary in nature. In this behalf he placed on judgment of the Hon'ble Supreme Court titled as Vidyavardbhaka Sangha and another vs. Y.D. Deshpande and others (2007) 2 SCC (L&S) 320. I am afraid the ratio of the said judgment would not apply to the facts of the present case as it pertained to appointments for a specified period and on adhoc basis. Admittedly those circumstances the appointment comes to an end by efflux of time and the person holding such post has no right to continue any further. In the instant case not doubt it was a conditional appointment, but it still could not be termed as adhoc or a casual engagement. After vacation of the interim orders and dismissal of the writ petition the respondent continued with the services of the workman regularly for almost one year and four months. It is thus inferable that the respondent had sufficient work in the said interregnum. If nothing else, the uninterrupted and continuous engagement of the petitioner for more than one year, not only gave them a vested right as per the provisions of the Act but also estopped the respondent from taking any contrary stand. It is not the case that the respondent had approached the Hon'ble Supreme Court. It is rather the workmen who had filed the SLP. There was no stay granted by any court and as such the continuance of the workman for such a long time cannot be said to be a adhoc or a specified appointment for a particular period. More strange is the ground espoused by the respondent in their reply to the statement of claim. Fearing contempt proceedings of a order which never came to be passed the respondent kept on waiting for a notice from the Civil Court. It is strange to believe. The corporation as the NHPC cannot be believed to have waited for some years for the Civil Court to pass same stay orders to order the termination of the workman.

33. It is no doubt true that initially the workman might have accepted employment conditionally. At that point of time it may not be engagement in the real sense of the term. However, after having continued for more than one year and that too continuously as is required under Section 25-B of the Act it ceased to be conditional. It thereafter cast an obligation on the respondent that henceforth the services of the workmen were to be dispensed with as per the procedure established by law. I say so because the engagement of the workman in the present case is not governed by article 309 of the Constitution of India. The engagement of this nature is neither governed by recruitment and promotion rules framed under the Constitutional mandate. It is an engagement on daily wages. Once a workman complete a minimum of 240 days in one year as per the mandate of the Act certain right come to be vested in him. He can thus be presumed to have come to believe that henceforth his termination would be as per the procedure established by law. That admittedly was not done in the present case. The termination of the workman thus has to be termed illegal. It cannot be sustained in any manner.

34. It is admitted fact as discussed above that the workman in the present case had come to be initially employed by virtue of interim orders passed by the Hon'ble High Court. Had the respondent not allowed the workman to complete more than one year, the service of the workmen would have come to an end by virtue of the interim orders.

35. Another features which startlingly comes to the fore is that the Civil Court more precisely the Id. Additional District Judge Fast Track Court, vide his judgment dated 6.9.2005 which has been placed on record by the petitioner in one of the reference titled as Gandhi Ram vs. GM, Chamera Hydro Electronic Project, Chamba had directed by way of an injunction to sponsor the names of the petitioner and seven other workmen similar situate to be sponsored by the respondent or grant financial package to them as per the agreement dated 5.3.1992 arrived inter se the parties. In this view of the matter too the respondent was either to grant a package to the workmen or to ensure employment to them. During the course of argument it was however brought to my notice that the three of the workmen namely Gandhi Ram, Suneet Singh and Desh Raj in pursuance to the aforesaid judgment have opted to exercise option of taking the package. If that be so the workman shall be entitled to one of the reliefs granted by the Civil Court i.e. either the package or the re-engagement. The aforesaid orders have come to be passed by the Civil Court as a sequel to the observations of the Hon'ble High Court in CWP No.488/91 whereby the petitioner and the other similar situate workmen were given the liberty to approach the competent forum.

36. In those circumstances while holding that the termination of the petitioner to be illegal and ordering the reengagement of the workman I do not deem it just and proper to order the payment of back-wages to the workman. However, the respondent shall pay an amount of Rs.20,000/- to the workman for having violated the statutory mandate of the Industrial Disputes Act. The issue is decided accordingly.

ISSUE NO. 3

37. Nothing has been urged nor anything has been brought to my notice as to how the reference is bad for non-joinder of necessary parties. Moreover for the reasons discussed above it does not seem that any party who was necessary for the just decision of the case had not been impleaded to the lis. The issue is decided accordingly.

ISSUE NO. 2

38. Nothing has been urged before me as to how the petitioner had suppressed material facts.

39. Though it has been pleaded by the respondent that the workman approached the Civil Court and even filed SLP against the orders of the Hon'ble High Court but the same would not amount to suppression of material fact as the cause in the aforesaid right was on different footings. As discussed above the right of the petitioner has fractured as far as the present cause goes after having put in more than one year even after the dismissal of the CWP No.488/91. It cannot thus be inferred that the petitioner had concealed material fact from this court. The issue is decided accordingly.

RELIEF

40. For the foregoing reasons discussed hereinabove supra, the reference is partly allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged at the same place and post forthwith. He shall be entitled to continuity in service and seniority from the date of his termination, except back-wages. The petitioner shall however be entitled to Rs.20,000/- as compensation for having violated the statutory provisions of the Act as ordered hereinabove. It is however made clear that the workmen who have opted for the package as per the directions of the Civil Court dated 6.9.2005 shall be entitled to either the package or reengagement as ordered above. The respondent shall either pay the entire package amount to the workman or failing which shall re-engage the workman. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 11th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 333/2009

Date of Institution : 30.5.2009

Date of decision : 30.4.2010

Smt. Meera Devi W/o Shri Achharu Ram, R/o Village Hawani, P.O. Ropadi, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Meera Devi W/o Shri Achharu Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on November, 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

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|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. She is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of her services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. She came to be employed on November, 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while her services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after her retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of her affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of her illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1330(A)/07-795 dated 8.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated March 16, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of her unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 22/2006

Date of Institution : 3.1.2006

Date of decision : 28.5.2010

Sh. Mehar Chand S/O Sh. Mangat Ram V.P.O. Sulyali, Tehsil Nurpur, District Kangra, H.P.

....Petitioner

Versus

3. The Executive Engineer, H.P.P.W.D., Division, Nurpur, District Kangra, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Naresh Kaul, adv.

For the Respondent : Sh. Sanjeev Katoch, Ld.Dy.D.A.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Mehar Chand s/o Shri Mangat Ram workman by the Executive Engineer, H.P.P.W.D. Division Nurpur, District Kangra, H.P. w.e.f. Jan., 1990 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If no, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The workman namely Mehar Chand died on 2-5-2005 and his L.Rs had thereupon come to file the statement of claim.

3. Per them the deceased Mehar Chand was engaged by the respondent in the year 1985 in H.P.P.W.D. Sub-Division Nurpur. He had put more than 240 days in each calendar year. He was however, illegally retrenched in the year 1990 and many juniors to him were retained by the department.

4. It is further the case of the petitioner that the respondent had sufficient work involving construction and maintenance of roads. The Government had otherwise introduced new policies wherein every village was to be connected with the roads. Despite abundance of works the deceased had been illegally terminated. He continuously visited the respondent for reengagement but to no avail.

5. The deceased Mehar Chand had raised the matter (hereinafter referred to as the Act) through the union and resolution in his behalf was also sent to the Assistant Registrar of the H.P. State Administrative Tribunal, on 29-4-2002. Similarly situated worker had also made representation on 7-8-2002 to the Secretary Finance, Govt. of H.P., Shimla.

6. It is further the case of the petitioner that the persons juniors to the deceased were reengaged by the respondent ‘one of them being Smt. Kusam Lata w/o Sh. Roshan Lal’.

7. The action of the respondent was stated to be in violation of Section 25-F, 25-H and 25-G of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act).

8. The petitioner thus sought that the termination of Late Sh. Mehar Chand be declared as null and void and the applicant number 1 i.e. the son of the deceased be offered appointment along with consequential benefits.

9. While contesting the claim the respondent raised the preliminary objection that the petition having been filed after 12 years from the date of alleged retrenchment it was barred by limitation.

10. On merits the case of the respondent is that Mehar Chand had been engaged by the respondent in the month of February, 1986 and he had rendered 240 days only in the year of 1989. He had worked upto December, 1989 and the deceased Mehar Chand had left the job on his own.

11. Further per the respondent only few persons were engaged by the department after the termination of the deceased Mehar Chand and that too in pursuance to the orders of the Hon’ble Administrative Tribunal. One Smt.

Kusam Lata was engaged in the year 2000 by the department but she had been appointed as store clerk i.e. under a different category.

12. While filing the rejoinder the averments in the reply were controverted and those in the claim were reiterated. The petitioner further detailed the names of the eight people who had been engaged by the respondent in the year 2002-2003 in the rejoinder.

13. Based on the aforesaid pleadings my Ld. Predecessor had framed the following issues for determination:

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to?OPP.
2. Whether the services of the petitioner were not terminated, but he had abandoned the job of his own. ...OPR.
3. Whether the petition suffers from the vice of delay and laches. If so, to what effect ? ..OPR.
4. Relief.

14. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus;

Issue No. 1	No
Issue No.2	Yes
Issue No.3	Yes
Issue No.4	Claim petition dismissed.

REASONS FOR FINDINGS

ISSUES NO. 1, 2 & 3

15. All the three issues have been taken up together as they are correlated and inter mingled.

16. Moreover the facts of the case are peculiar and as such all the three issues are required to be discussed simultaneously.

17. The deceased Mehar Chand is alleged to have been terminated in December, 1989. The "Industrial Dispute" thereupon came to be raised December in the year 2002 i.e. after 12 years. Eventually by the time the reference was sent by the appropriate Government on 24-11-2005 Sh. Mehar Chand had died on 2-5-2005.

18. The reference pertained to the termination of Late Sh. Mehar Chand and the benefits arising thereto on his reengagement is the case issue to be decided. The relief of reengagement if offered would have been personal to the deceased. Late Sh. Mehar Chand, the workman having died, the said relief cannot be granted to the petitioner.

19. No doubt, by now it is well settled that the provisions of the limitation Act are not applicable strictly in respect of the disputes arising under the provisions of the Act and it may not be open for this Court to oust the reference on the ground of delay alone. Down the line it has come to be held by the Courts that the delay at best could effect only the quantum of backwages payable to the retrenched workmen. Not only this the stale claim may otherwise defeat the rights of the party and so the remedy. It is one such case. The deceased Mehar Chand having died, the right vested in him has also died its own death. Consequently even if the claim is not barred by limitation it has indeed become stale.

21. I say so, keeping in view the facts of the present case. As is clear from Ex. RW1/B Late Sh. Mehar Chand had not completed 240 days in the precedings 12 month of his termination. Even assuming that certain juniors had been reengaged by the respondent after the termination of Late Sh. Mehar Chand, and violated the provisions of section 25-H, seeing to the long delay in filing the reference at best late Sh. Mehar Chand could have been directed to be reengaged in the same capacity, devoid of any back wages. The petitioners being L.Rs of deceased Mehar Chand could not be ordered to be reengaged. At best they could have been entitled to the pecuniary benefits i.e. back wages and other consequential benefits arising from the re-engagement. On the face of back wages being not awarded, no effective relief can be ordered in favour of the petitioner.

22. In respect of the violation of Section 25-G the petitioners have tried to high light that one Smt. Kusam Lata was engaged by the respondent in the year 2000. The said contention was repelled by the respondent that she had been appointed as a store clerk. The said fact has not been rebutted by the petitioners by putting it to the Executive Engineer

Sh. A.K. Abrol while appearing RW1 to remotely suggest that even Smt. Kusam Lata was engaged as a daily waged beldar and not as a store clerk. The petitioners have also not put to the witness the name of the persons stated to have been reengaged by the respondent in the year 2002-2003 as discussed in the rejoinder. Thus, even otherwise it could not be inferred that the respondent had violated the provisions of Section 25-H.

23. For all the aforesaid reasons discussed herein above. It can neither be said that the termination of the service of late Sh. Mehar Chand was illegal. Because of the delay in it in raising the dispute or filing the claim the right of the deceased Mehar Chand has literally died its own death. It is thus indeed a stale claim having lost both the right and the remedy to claim the post he had been terminated from. Since, even consequential relief is also not made out, indeed the right of the petitioner fades into total oblivion.

24. The issues are accordingly decided against the petitioner and in favour of the respondent.

RELIEF

25. For all the foregoing reasons discussed the reference fails and is accordingly dismissed. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room. Announced in the open Court today this 28th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala,
H.P.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 109/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Milap Chand S/o Shri Tarahdu Ram, R/o Village Baag (Gadidhar), P.O. Graudoo, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Milap Chand S/o Shri Tarahdu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First

come, last go". The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has *inter-alia* raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.

Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (iii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003

respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 860/2007-10009, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may

have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 107/2005
Instituted on : 13.7.2005
Decided on : 1.6.2010.

Shri Naginder Kumar S/o Shri Goverdhan, R/o Village Guhila, P.O. Majhwar, Tehsil Sadar, Distt. Mandi,
H.P.Petitioner

Vs

The Executive Engineer, HPSEB (Electrical) Division, Mandi, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Tek Chand Sharma, Adv.

For the Respondent : Sh. J.S. Chauhan, Adv.

AWARD

1. The reference has been received from the appropriate Government for determination:

“Whether the termination of services of Shri Naginder Kumar S/o Shri Goverdhan workman by the Executive Engineer, HPSEB (Electrical) Division, Mandi, w.e.f. 18.2.2000 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, to what relief of consequential service benefits including reinstatement, seniority, back-wages and amount of compensation the above aggrieved workman is entitled?”

2. While filing the statement of claim the petitioner avers that he was engaged as a beldar on daily wages by the respondent Board w.e.f. 13th May, 1998 and he continued to work as such till 17th February, 2000. He was given fictional breaks by the respondent, nonetheless he had completed 240 days in the year 1998-1999 but he was not allowed to complete the same in the preceding 12 calendar months of his termination.

3. The services of the petitioner had been terminated arbitrarily and illegal by way of an oral order and without serving any notice as required under rule 14(2) of the Standing Orders of the HPSEB. The respondent has also not assigned seniority to the workman as such violated the provisions of Section 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The petitioner had also requested the respondent to reengage him against some work but the respondent had engaged three other beldars namely Smt. Uma Devi W/o Shri Parminder Kumar, Surinder

Kumar S/o Shri Shri Sewak Ram and Jagdish Kumar S/o Shri Jeewan Singh. All the three were juniors to the petitioner and they had been retained by the respondent.

4. The termination was stated to be in violation of the rule 14(2) of the HPSEB Standing Orders, Section 25-F of the Industrial Disputes Act and against the principle of 'last come first go'. The petitioner thus sought his reengagement along with all consequential benefits.

5. The respondent Board while contesting the claim inter alia raised the preliminary objections vis-à-vis maintainability, estoppel, limitation and non-joinder of necessary parties.

6. On merits it is the case of the respondent that the petitioner was engaged against work which was casual in nature. He had thus worked with certain interruption and breaks coupled with his willful absence during 24.2.2002. The last muster roll was issued to the petitioner w.e.f. 25.1.2000 to 24.2.2000 but since the work of the said scheme under which the petitioner had been engaged was completed on 17.2.2000, his services were terminated on the same date. Per the respondent the petitioner had been appointed as casual worker against a specific scheme. The petitioner was stated to have not completed 240 days in a calendar year. Further, per the respondent the services of the petitioner had been terminated after completion of specific work once on 17.4.1999 and thereupon on 15.1.2000. Even earlier after the completion of the work of L.T. Line of Rakhooan, the services of the petitioner had been terminated by issuing a notice dated 7.4.1999. The petitioner was re-engaged for casual work again for the construction of Madhdhar H.T. Line w.e.f. 25.10.1999 to 17.2.2000. After the completion of the said work the services of the petitioner was terminated by issuing a legal notice on 15.1.2000. It was denied that any person juniors to the petitioner had been engaged by the respondent. The respondent thus sought the dismissal of the claim.

7. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.

8. I notice that the following issues came to be framed on 15.7.2006.

- | | | |
|----|---|-----|
| 1. | Whether the dis-engagement from the service of claimant in accordance with law? | OPP |
| 2. | If the above issue is in affirmative to what relief the claimant is entitled? | OPP |
| 3. | Whether the reference is stale, hence not maintainable? | OPR |
| 4. | Relief. | |

9. Initially this court vide an award dated 19.3.2007 had nonsuited the petitioner on the grounds of the claim being stale and hence not maintainable. The petitioner had assailed the said findings by way of a Writ Petition bearing CWP No.885/2007 whereby the findings recorded by this Court were quashed and set aside and this court was directed to adjudicate upon the reference afresh.

10. I have heard the Id. counsel for the parites and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

- | | |
|---------------|---|
| Issue No.1 : | No |
| Issue No.2 : | He is entitled to reinstatement with continuity in service and seniority. |
| Issue No.3 : | No. |
| Issue No. 4 : | Allowed as per operative part of the award. |

REASONS FOR FINDINGS

ISSUE No. 3

11. The question of reference being stale and as such not maintainable having been conclusively answered by the Hon'ble High Court vide its order dated 1.11.2007 in CWP No.885/2007 in favour of the petitioner need not be deliberated again. It has been held by the Hon'ble High Court while setting aside the award passed by this court that the reference was not stale so as to result in the petitioner losing the remedy and the right too. The delay in the facts and circumstances of the present case has not been held to be fatal. The issue thus has to be held against the respondent and in favour of the petitioner.

ISSUES NO. 1 and 2

12. Both the issues are being co-related are being taken up together for discussion and even to avoid repetition.

13. It is apparently not in dispute that the petitioner had not completed 240 days prior to his termination on 17.2.2000. The petitioner has himself pleaded so. Even the mandays chart Ex. RW1/C shows that the petitioner had

completed only 177 days in the 12 calendar months preceding his termination. It may thus not be possible to hold that the petitioner was in "continuous service" in the preceding twelve months as per the requirement postulated by Section 25-F.

14. However, the respondent has raised a plea that the petitioner had been engaged against specific work and as such when the work came to an end his services were dispensed with and that too by issuing a notice. It is the pleaded case of the respondent that though the last muster roll was issued to the petitioner w.e.f. 25.1.2000 to 24.2.2000 but the work of the said scheme was completed on 17.2.2000 and the services of the petitioner was terminated on the same date.

15. The respondent had placed on record the purported notice issued to the petitioner vide Ex. RW1/B. A bare glance of the said notice shows that it was issued on 15.1.2000 and not on 17.2.2000 as pleaded by the respondent. In fact Ex. RW1/B is a one month advance notice. Once the respondent in its wisdom had resorted to issuing a month's advance notice, the other condition precedent as enumerated in clause (b) and (c) of the provisions of Section 25-F were also required to be followed. The same was however not done in the present case. There is no such evidence on record.

16. Not only this, there is nothing on record to remotely suggest that the petitioner had been appointed against a specific work. Though it is pleaded by the respondent that the petitioner was appointed against the construction of L.T. line in Madhdhar and Rakhoohan but there is no evidence on record to corroborate the said version.

17. The petitioner while leading additional evidence has further placed on record the mandays chart in respect of workmen Surinder Kuamr Ex. P1, Jagdish Kumar Ex. P2 and Smt. Uma Devi Ex. P3. The said documents show that all the three workmen were appointed about 5-6 months after the petitioner. Ex. PA the seniority list of daily wagers and that also shows so.

18. Section 25-G of the Act postulates that any workmen is to be retrenched and he belongs to a particular category of workman, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. The provisions of Section 25-G are mandatory. It was strictly required to be followed. In fact the seniority list of daily wagers is prepared primarily to follow the principle of "last come first go." The action of the respondent in not adhering to the statutory provisions of the Section 25-G is in itself fatal for the respondent. Not only this the said contravention of the provisions of Section 25-G also casts a serious doubt over the plea raised by the respondent that the petitioner had been employed against a specific work. The seniority list Ex. PA demolishes the plea set by the respondent that the petitioner was appointed for specific project/work. Therefore a possibility cannot be ruled out that the respondent had given a fictional break to the petitioner to deprive him of his legal right under Section 25-F. Be it as it may, the fact however remains that the respondent by retaining junior persons to the petitioner have violated the provisions of Section 25-G of the Industrial Disputes Act and as such the termination of the petitioner is indeed bad in the eyes of law. Initial onus was on the petitioner to prove that he was not gainfully employed during his forced idleness. There is no whisper in his testimony of that being so. The petitioner is thus not entitled to benefit of back-wages. He is however, entitled to the seniority and continuity of service w.e.f. his illegal termination.

19. The issues are accordingly decided in favour of the petitioner and against the respondent.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 1st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 49/2006
Instituted on : 20.3.2006
Decided on : 1.6.2010.

Shri Nand Lal S/o Shri Jhabe Ram, R/o Village Algan, P.O. Kataula, Tehsil Sadar, Distt. Mandi, H.P.

.....Petitioner

Vs

Executive Engineer, I&PH Division, Padhar, Distt. Mandi, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Lalit Thakur, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy. D.A.

AWARD

1. The reference has been received from the appropriate Government for determination:

“Whether the termination of services of Shri Nand Lal S/o Shri Jhabe Ram workman by the Executive Engineer, I&PH Division, Padhar, Distt. Mandi, H.P. w.e.f. 1.6.2003 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. Per the petitioner he was engaged as daily paid labourer in the year September, 2001 by the respondent in I&PH Sub Division Katola, Tehsil Sadar, District Mandi and he continued to work as such till 24.5.2003. The petitioner had completed 240 days preceding his termination on 25th May, 2005.

3. The termination was stated to be in violation of the provisions of Section 25-F and 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). It is further the case of the petitioner that the respondent has retained juniors to the petitioner. He therefore sought his reengagement from the date of termination with back-wages and continuity of service.

4. While contesting the claim the respondent inter alia raised a preliminary objection vis-à-vis non joinder of necessary parties and that the petition was not maintainable. Qua maintainability it is the assertions of the respondent that since the petitioner had been engaged without prior approval of the Finance Department and as such the initial engagement of the petitioner was illegal, there was no question of the respondent following the procedure laid down under the provisions of Section 25-F of the Act.

5. On merits too it is contention of the respondent that the claim petition is not maintainable as the petitioner had been engaged without prior approval of the Finance Department and since his initial engagement was illegal, there is no “industrial dispute” as contemplated under Section 10 of the Act. The disengagement of the petitioner on 25.5.2003 was thus stated to be legal. It was denied that the juniors have been retained by the respondent.

6. While filing rejoinder the petitioner controverted the averments in the reply and reaffirmed those in the statement of claim. 7. On 18.2.2008 the following issues were framed for determination:

1. Whether the termination from the service of the petitioner by the respondent is proper and justified? OPP
2. If the above issue is proved in affirmative to what relief of service benefit the claimant is entitled to the respondent? OPP
3. Whether the claim petition is not maintainable on account of non-joinder and mis-joinder? OPR
4. Whether the service of the petitioner were not engaged in accordance with law. Hence, whether his dispensation from the service by the respondent is legal and justified? OPR
5. Relief.

7. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

- | | |
|-----------|--|
| Issue 1 : | No |
| Issue 2 : | He is entitled to reinstatement along with 50% back-wages and continuity and seniority of his service. |
| Issue 3 : | No |
| Issue 4 : | No |
| Relief : | Allowed as per operative part of the Award. |

REASONS FOR FINDINGS**ISSUES 1, 2 and 4**

8. All the three issues may be conveniently clubbed together to avoid repetition. More so, the issues are also co-related.

9. In order to discharge the initial burden that the petitioner has completed 240 days, he has placed on record his mandays vide Ex. PW1/C. A bare glance of the said chart shows that the petitioner had completed 318 days preceding his termination on 24.5.2003. These are undisputed fact.

10. The ground sought to be espoused by the respondent to sustain the termination is that since the petitioner had been engaged initially without seeking approval of the Finance Department, his appointment was void and as such his termination was beyond the domain of an "industrial dispute".

11. This is in short the pleaded case of the respondent. Strangely, however, the Executive Engineer while appearing as RW1 has merely deposed that the petitioner had left work at his own will and did not turn up for duty during the year 2003. The petitioner was not terminated from the service but he had left the job on his own. There is no whisper in the testimony of RW1 that the petitioner had been engaged without the prior approval of the Finance Department and as such his initial engagement was illegal.

12. On the face of two divergent situation arising on record i.e. one which is the pleaded case of the respondent and secondly which is sought to be proved, the action of the respondent seems to be guided by malafide. There is no proof on record that the initial engagement of the petitioner was without any financial approval. Mere pleading the fact would not suffice. No evidence worth the name is on record to remotely suggest that the initial appointment of the petitioner was without any financial approval.

13. Even assuming it was so, I am afraid the respondent could not have given a complete go bye to the statutory provisions of the Industrial Dispute Act. Had the petitioner been engaged in violation of the financial approval but having worked continuously as per the requirement of the provisions of Section 25-B of the Act, the termination thereupon had too fall within the scope of "retrenchment" as envisaged under Section 25-F of the Act. So the respondent was duty bound to have acted accordingly. Even if the initial appointment of the petitioner was bad for want of financial sanction even then his termination as a sequel thereto would fall within the purview of "retrenchment". The respondent had to thereupon resort to the provisions of Section 25-F of the Act.

14. "Retrenchment" has been defined thus under Section 2(oo) of the Act. "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-

- (a) voluntary retirement of the workman; or
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
- (c) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
- (d) termination of the service of a workman on the ground of continued ill-health;"

15. Want of financial sanction/approval is not covered by any of the exceptions as enumerated in sub clause (a), (b), (bb) and (c) of Section 2(oo) of the Act. Termination of the employee on the ground of want of financial sanction thus could not be resorted to without complying with the provisions of the Industrial Disputes Act. Rather it could have been indicated as the reason for retrenchment, which is a condition precedent for effecting retrenchment of under sub Section (a) of Section 25 (F) of the Act. Thus the termination of service even an account of want of financial sanction (initial) would tantamount to retrenchment and the employer/respondent was under a legal obligation to follow the procedure prescribed under Section 25-F of the Act.

16. For all the reasons discussed above it is to be held that the termination of the petitioner was not proper and justified.

17. The petitioner has discharged to his initial onus by deposing that he was not gainfully employed. Nothing to the contrary has been proved on record by the respondent. More over, the respondent has acted in gross violation of the provisions of the Industrial Disputes Act. The petitioner is thus entitled to 50% back-wages from the date of his illegal termination i.e. 1.6.2003. Needless to reiterate that the break in service as a result of illegal termination shall be counted towards seniority and continuity of service of the petitioner.

ISSUE No. 3

18. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

19. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be reinstated and shall also be entitled to seniority and continuity along with 50% back-wages. The respondent shall reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 1st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 63/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Nanku Ram S/o Shri Chamaru Ram, R/o Village Hawani, P.O. Ropadi, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Nanku Ram S/o Shri Chamaru Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the "specified authority" as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS**ISSUE NO. 1**

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"

- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in

writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent’s reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held: "It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 882/2007-9950, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 10, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
 CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 104/2005
Instituted on : 13.7.2005
Decided on : 1.6.2010.

Shri Naresh Kumar S/o Shri Chuhan Singh, R/o Village Gihula, P.O. Majhwar, Tehsil Sadar, Distt. Mandi,
 H.P.Petitioner

Vs

The Executive Engineer, HPSEB (Electrical) Division, Mandi, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. Tek Chand Sharma, Adv.

For the Respondent : Sh. J.S. Chauhan, Adv.

AWARD

1. The reference has been received from the appropriate Government for determination:

“Whether the termination of services of Shri Naresh Kumar S/o Shri Chuhan Singh workman by the Executive Engineer, HPSEB (Electrical) Division, Mandi, w.e.f. 18.2.2000 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, to what relief of consequential service benefits including reinstatement, seniority, back-wages and amount of compensation the above aggrieved workman is entitled?”

2. While filing the statement of claim the petitioner avers that he was engaged as a beldar on daily wages by the respondent Board w.e.f. 13th May, 1998 and he continued to work as such till 17th February, 2000. He was given fictional breaks by the respondent, nonetheless he had completed 240 days in the year 1998-1999 but he was not allowed to complete the same in the preceding 12 calendar months of his termination.

3. The services of the petitioner had been terminated arbitrarily and illegal by way of an oral order and without serving any notice as required under rule 14(2) of the Standing Orders of the HPSEB. The respondent has also not assigned seniority to the workman as such violated the provisions of Section 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The petitioner had also requested the respondent to reengage him against some work but the respondent had engaged three other beldars namely Smt. Uma Devi W/o Shri Parminder Kumar, Surinder Kumar S/o Shri Shri Sewak Ram and Jagdish Kumar S/o Shri Jeewan Singh. All the three were juniors to the petitioner and they had been retained by the respondent.

4. The termination was stated to be in violation of the rule 14(2) of the HPSEB Standing Orders, Section 25-F of the Industrial Disputes Act and against the principle of ‘last come first go’. The petitioner thus sought his reengagement along with all consequential benefits.

5. The respondent Board while contesting the claim inter alia raised the preliminary objections vis-à-vis maintainability, estoppel, limitation and non-joinder of necessary parties.

6. On merits it is the case of the respondent that the petitioner was engaged against work which was casual in nature. He had thus worked with certain interruption and breaks coupled with his willful absence during 24.2.2002. The last muster roll was issued to the petitioner w.e.f. 25.1.2000 to 24.2.2000 but since the work of the said scheme under which the petitioner had been engaged was completed on 17.2.2000, his services were terminated on the same date. Per the respondent the petitioner had been appointed as casual worker against a specific scheme. The petitioner was stated to have not completed 240 days in a calendar year. Further, per the respondent the services of the petitioner had been terminated after completion of specific work once on 17.4.1999 and thereupon on 15.1.2000. Even earlier after the completion of the work of L.T. Line of Rakhooan, the services of the petitioner had been terminated by issuing a notice dated 7.4.1999. The petitioner was re-engaged for casual work again for the construction of Madhdhar H.T. Line w.e.f. 25.10.1999 to 17.2.2000. After the completion of the said work the services of the petitioner was terminated by issuing a legal notice on 15.1.2000. It was denied that any person juniors to the petitioner had been engaged by the respondent. The respondent thus sought the dismissal of the claim.

7. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.

8. I notice that the following issues came to be framed on 15.7.2006.

- | | | |
|----|---|-----|
| 1. | Whether the dis-engagement from the service of claimant in accordance with law? | OPP |
| 2. | If the above issue is in affirmative to what relief the claimant is entitled? | OPP |
| 3. | Whether the reference is stale, hence not maintainable? | OPR |
| 4. | Relief. | |

9. Initially this court vide an award dated 19.3.2007 had nonsuited the petitioner on the grounds of the claim being stale and hence not maintainable. The petitioner had assailed the said findings by way of a Writ Petition bearing CWP No.894/2007 whereby the findings recorded by this Court were quashed and set aside and this court was directed to adjudicate upon the reference afresh.

10. I have heard the ld. counsel for the parites and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

- | | |
|---------------|---|
| Issue No.1 : | No |
| Issue No.2 : | He is entitled to reinstatement with continuity in service and seniority. |
| Issue No.3 : | No. |
| Issue No. 4 : | Allowed as per operative part of the award. |

REASONS FOR FINDINGS

ISSUE No. 3

11. The question of reference being stale and as such not maintainable having been conclusively answered by the Hon'ble High Court vide its order dated 30.10.2007 in CWP No.894/2007 in favour of the petitioner need not be deliberated again. It has been held by the Hon'ble High Court while setting aside the award passed by this court that the reference was not stale so as to result in the petitioner losing the remedy and the right too. The delay in the facts and circumstances of the present case has not been held to be fatal. The issue thus has to be held against the respondent and in favour of the petitioner.

ISSUES NO. 1 and 2

12. Both the issues are being co-related are being taken up together for discussion and even to avoid repetition.

13. It is apparently not in dispute that the petitioner had not completed 240 days prior to his termination on 17.2.2000. The petitioner has himself pleaded so. Even the mandays chart Ex. RW1/C shows that the petitioner had completed only 177 days in the 12 calendar months preceding his termination. It may thus not be possible to hold that the petitioner was in "continuous service" in the preceding twelve months as per the requirement postulated by Section 25-F.

14. However, the respondent has raised a plea that the petitioner had been engaged against specific work and as such when the work came to an end his services were dispensed with and that too by issuing a notice. It is the pleaded case of the respondent that though the last muster roll was issued to the petitioner w.e.f. 25.1.2000 to 24.2.2000 but the work of the said scheme was completed on 17.2.2000 and the services of the petitioner was terminated on the same date.

15. The respondent had placed on record the purported notice issued to the petitioner vide Ex. RW1/B. A bare glance of the said notice shows that it was issued on 15.1.2000 and not on 17.2.2000 as pleaded by the respondent. In fact Ex. RW1/B is a one month advance notice. Once the respondent in its wisdom had resorted to issuing a month's advance notice, the other condition precedent as enumerated in clause (b) and (c) of the provisions of Section 25-F were also required to be followed. The same was however not done in the present case. There is no such evidence on record.

16. Not only this, there is nothing on record to remotely suggest that the petitioner had been appointed against a specific work. Though it is pleaded by the respondent that the petitioner was appointed against the construction of L.T. line in Madhdhar and Rakhooan but there is no evidence on record to corroborate the said version.

17. The petitioner while leading additional evidence has further placed on record the mandays chart in respect of workmen Surinder Kuamr Ex. P1, Jagdish Kumar Ex. P2 and Smt. Uma Devi Ex. P3. The said documents show that all the three workmen were appointed about 5-6 months after the petitioner. Ex. PA the seniority list of daily wagers and that also shows so.

18. Section 25-G of the Act postulates that any workmen is to be retrenched and he belongs to a particular category of workman, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. The provisions of Section 25-G are mandatory. It was strictly required to be followed. In fact the seniority list of daily wagers is prepared primarily to follow the principle of "last come first go." The action of the respondent in not adhering to the statutory provisions of the Section 25-G is in itself fatal for the respondent. Not only this the said contravention of the provisions of Section 25-G also casts a serious doubt over the plea raised by the respondent that the petitioner had been employed against a specific work. The seniority list Ex. PA demolishes the plea set by the respondent that the petitioner was appointed for specific project/work. Therefore a possibility cannot be ruled out that the respondent had given a fictional break to the petitioner to deprive him of his legal right under Section 25-F. Be it as it may, the fact however remains that the respondent by retaining junior persons to the petitioner have violated the provisions of Section 25-G of the Industrial Disputes Act and as such the termination of the petitioner is indeed bad in the eyes of law. Initial onus was on the petitioner to prove that he was not gainfully employed during his forced idleness. There is no whisper in his testimony of that being so. The petitioner is thus not entitled to benefit of back-wages. He is however, entitled to the seniority and continuity of service w.e.f. his illegal termination.

19. The issues are accordingly decided in favour of the petitioner and against the respondent.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 1st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 169/2009
Date of Institution : 27.2.2009
Date of decision : 20.5.2010

Shri Nathu Ram S/o Shri Shankar Dass, R/o Village Khajuherati, P.O. Cholgaharh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Nathu Ram S/o Shri Shankar Dass by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on May, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus,

to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
 - (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
 - (7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a

judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on May, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily

retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act,

1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1156/07-294, dated 21.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 24, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 6/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Om Chand S/o Shri Sukh Ram, R/o village Karnohal, P.O. Sajao Piplu, Tehsil Sarkaghat, Distt. Mandi,
H.P.Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
Sh. Vijay Kaundal, Adv.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Om Chand S/o Shri Sukh Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1.1.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-
1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? OPP
 2. Whether the petition is not maintainable, as alleged. OPR
 3. Whether the petition suffers from the vice of delay and laches. OPR
 4. Whether the petitioner is guilty of suppressio veri. OPR
 5. Whether the petitioner is estopped from filing the claim petition by her act and conduct. OPR
 6. Relief.
12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- Issue 1 : Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
- Issue 2 : No.
- Issue 3 : No
- Issue 4 : No
- Issue 5 : No
- Relief. : The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is

thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1.1.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/45/05 & 758/07-10076, dated 8.12.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 48/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Pardeep Kumar S/o Shri Devi Ram, R/o Village Kulhahan, P.O. Pehad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 Sh. Vijay Kaundal, Adv.
 For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Pardeep Kumar S/o Shri Devi Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on November, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof (clvii) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on November 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 873/2007-9995 dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 11, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 79/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Parkash Chand S/o Shri Laskari Ram, R/o Village Baral, P.O. Baroti, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Parkash Chand S/o Shri Laskari Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed or determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

OPP

2.	Whether the petition is not maintainable, as alleged.	OPR
3.	Whether the petition suffers from the vice of delay and laches.	OPR
4.	Whether the petitioner is guilty of suppressio veri.	OPR
5.	Whether the petitioner is estopped from filing the claim petition by her act and conduct.	OPR
6.	Relief.	

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 896/2007-10027, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 258/2009
Date of Institution : 7.3.2009
Date of decision : 20.5.2010

Shri Parkash Chand S/o Shri Parma Ram, R/o Village Morala, P.O. Brang, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Parkash Chand S/o Shri Parma Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on May, 1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

OPP

2.	Whether the petition is not maintainable, as alleged.	OPR
3.	Whether the petition suffers from the vice of delay and laches.	OPR
4.	Whether the petitioner is guilty of suppressio veri.	OPR
5.	Whether the petitioner is estopped from filing the claim petition by her act and conduct.	OPR
6.	Relief.	

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (iii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on May, 1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 titled as Executive Engineer, Dharampur vs. Nihal Chand and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of backwages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 1310/07-593, dated 6.2.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 225/2009
Date of Institution : 27.2.2009
Date of decision : 20.5.2010

Smt. Phula Devi W/o Shri Ramji, R/o Village Khajuriti, P.O. Cholgahar, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.
....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Smt. Phula Devi W/o Shri Ramji by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that she was appointed as a daily waged beldar by the respondent on March, 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and her services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to her namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that she has completed 240 days during the preceding 12 calendar months prior to her termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by her act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to?

OPP

2.	Whether the petition is not maintainable, as alleged.	OPR
3.	Whether the petition suffers from the vice of delay and laches.	OPR
4.	Whether the petitioner is guilty of suppressio veri.	OPR
5.	Whether the petitioner is estopped from filing the claim petition by her act and conduct.	OPR
6.	Relief.	

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

Issue 1 :	Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination.
Issue 2 :	No.
Issue 3 :	No
Issue 4 :	No
Issue 5 :	No
Relief. :	The petition allowed partly per operative part of the award.

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25- N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an "industrial establishment" within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof (clxiii) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- (i) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that

in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.*(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as “malafide”.

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the “specified authority” from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of her being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One

of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- (3) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of her statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of her retrenchment. This claim of her having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my

notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of her grievance, her claim suffers from the vice of delay and laches, which disentitles her to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1163/07-301 dated 21.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated January 24, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by her unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of her grievance. Her claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 251/2009

Date of Institution : 7.3.2009

Date of decision : 30.4.2010

Shri Pitamber Lal S/o Shri Sant Ram, R/o Village Beed, P.O. Darwad, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

For the Respondent : Sh. H.S. Dhiman, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Pitamber Lal S/o Shri Sant Ram by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above Employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 1998 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|--|
| Issue 1 : | Yes. He is entitled to reinstatement, 50% back-wages and continuity of service from the date of termination of his services. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);”

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an ‘industrial establishment’ within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression “factory” occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

“(m) “factory” means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place.”

16. The parties’ pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a “factory” as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an “industrial establishment” within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner’s services were dispensed with, in its material part reads:

“25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months’ notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf”

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.”

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an “industrial establishment” within the meaning of Section 25L (a) of the Act, the petitioner’s retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

"25B. Definition of continuous service. For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (i) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (ii) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (iii) two hundred and forty days, in any other case...."

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. PW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 1998. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter-alia stipulate that an employer shall follow the principle of "last come first go" as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

"25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/A-2. The name of Shashi Kumar S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/A-2) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The nonapplication of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The petitioner in paragraph 9 of his affidavit Ex. PW1/A inter alia averred "*that the applicant is still unemployed and not gainfully working anywhere from the date of his illegal retrenchment i.e. 8.7.2005.*" There being no rebuttal to this deposition of his, his claim deserves acceptance and is accepted. Not only this, there is no cross-examination of the petitioner on this aspect of the matter. In view of the facts and circumstances of the case and more so the fact that the respondents have brazenly offended the statutory provisions of Section 25-G, the petitioner is held entitled to 50% back-wages from the date of his unlawful retrenchment. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 &1276/07-279 dated 19.1.2008. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated February 26, 2009. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with 50% back-wages and continuity of service from the date of his unlawful retrenchment (July 8, 2005). The said 50% back-wages shall be computed on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act whichever is higher till the date of reinstatement of the petitioner. The respondent is directed to reinstate the petitioner within a period of 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 30th day of April, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 214/2003

Instituted on : 30.7.2003

Decided on : 1.6.2010.

Shri Pitamber Lal Sharma S/o Shri Tulsi Ram, R/o Village Kangra, P.O. Rajwari, Tehsil Sadar, Distt. Mandi, H.P.Petitioner

Vs

The Executive Engineer, Transmission Division, HPSEB, Bilaspur, District Bilaspur, H.P.Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.

For the Respondent : Sh. R.L. Sharma, Adv.

AWARD

1. The reference has been received from the appropriate Government for determination:

“Whether the termination of services of Shri Pitamber Lal Sharma S/o Shri Tulsi Ram, daily wages beldar w.e.f. 31.12.1997 by the Executive Engineer, Transmission Division, HPSEB, Bilaspur, H.P. without complying the provisions of Industrial Disputes Act, 1947 and Rule 14(2) of the Certified Standing Orders is proper and justified? If not, what relief and compensation the aggrieved workman is entitled to?”

2. The case set up by the petitioner in his statement of claim is that he was employed as a daily waged beldar in HPSEB Sub Division Sunder Nagar under Transmission Division Bilaspur on 1.3.1995 and he continued to work as such till 31.12.1997. His services were terminated on the said dated on the ground of non-availability of work. The respondents have not served any notice to this effect nor any compensation was paid to him in lieu of such notice. The petitioner was not issued any notice under para 14 sub para (ii) of the HPSEB Industrial Establishment Standing Orders adopted by the Board wherein 10 days prior notice was required to be issued to the petitioner.

3. It is further the case of the petitioner that the respondents have retained juniors to the petitioner namely Payare Lal, Rakesh Kumar, Shyam Lal, Naresh Kumar, Bhagat Ram, Pritam Dass and Ram Nath. Ram Nath and Payare Lal are stated to have been engaged on 4.11.1999, Rakesh Kumar on 2.3.1999 and Shyam Lal on 21.4.1999. Therefore the respondents are stated to have violated the provisions of Section 25-G of the Industrial Disputes Act (hereinafter referred to as the Act).

4. The petitioner had earlier approached the H.P. Administrative Tribunal and the petition have been dismissed for want of jurisdiction. The petitioner thus seeks re-engagement with all consequential benefits.

5. While contesting the claim it is admitted by the respondent that the petitioner remained on duty w.e.f. 1.3.1995 to 31.12.1997. The petitioner however is stated to have not reported for duty thereafter. Per the respondent therefore no notice was required to be served him.

6. As per the respondent the petitioner's service was never terminated by them but he himself absented from duty and never reported back. The petitioner is further stated to have remained on duty from 26.2.1996 to 25.3.1996, 1.2.1997 to 25.2.1997, 26.6.1997 to 25.7.1997, 26.7.1997 to 25.8.1997 and 26.8.1997 to 25.9.1997.

7. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.

8. I notice that the following issues came to be framed on 19.7.2005.

1. Whether the services of the petitioner were terminated by the respondent w.e.f. 31.12.1997 in violation of the provisions of Industrial Disputes Act, 1947 as alleged? OPP
2. If issue No.1 is proved in affirmative to what service benefits/compensation the petitioner is entitled to? OPP
3. Whether the petitioner is left the job himself at his own on 31.12.1997 as alleged if so its effect? OPR

4. Relief.

9. I have heard the ld. counsel for the parties and gone through the pleadings, evidence and other attendant material facts placed on record on the same and my findings on the aforesaid issues are as under:

- Issue No.1 : Yes
 Issue No.2 : He is entitled to reinstatement with continuity in service and seniority.
 Issue No.3 : No.
 Issue No. 4 : Allowed as per operative part of the award.

REASONS FOR FINDINGS

ISSUES 1, 2 and 3

10. All the three issues being co-related are being taken up for discussion together.

11. The petitioner alleges that his services were terminated in violation of the provisions of the Industrial Disputes Act and Rule 14(2) (B) of the Standing Orders and the same is the point of reference.

12. The respondents while contesting the claim aver that the services of the petitioner were not terminated but he himself absented from duty and never reported back. In this behalf the respondents have examined Sh. Babu Ram Bhardwaj, Senior Executive Engineer, Transmission Division HPSEB, Bilaspur as RW1. Except for his bald statement that the petitioner never reported for duty after 25.9.1997 there is no documentary evidence on record to remotely suggest that the petitioner had ever been issued any show cause notice to explain about his willful absence. Willful absence from duty entails either holding of an inquiry or in the alternative complying with the provisions of the Industrial Disputes Act. There is no evidence on record that any inquiry was initiated against the petitioner for his absence and admittedly as is the case of the respondent no action was initiated against him under the Industrial Disputes Act.

13. Though it is admitted in the reply that the petitioner remained on duty from 1.3.1995 to 31.12.1997 but in para 5 the respondent has tried to portray that the petitioner had worked for shorter period and as such had not fulfilled 240 days. Once having admitted that the petitioner remained on duty till 31.12.1997 the testimony of RW1 that he did not report to duty after 25.9.1997 becomes highly suspect. More so keeping in view the fact that for his absence no documentary evidence has been placed on record by the respondent to substantiate the allegations. Nor is there any evidence that the department had initiated any inquiry against the petitioner.

14. Though it is not averred in the reply that the respondent Board had been exempted from the applicability of the provisions of the Industrial Employment (Standing Orders) Act, 1946 but RW1 has said so in his affidavit by way of evidence but the affidavit also does not show as to from which date the Board had been exempted from the operations of the Standing Orders. There is no specific denial about the juniors mentioned in para No.3 having been retained by the respondent. Even RW1 while appearing as witness has stated that since the petitioner had himself absented from duty, it cannot be said that the juniors were wrongly retained by the department.

15. The petitioner also submits that he worked in December, 1997 and had been paid wages thereto. The fact being admitted by the respondent in their reply, the plea of abandonment does not seem to be probable. The mandays chart placed by the respondent on record vide Exhibits RW1/F and RW1/G, thus also seems to be doubtful. For the sake of arguments even if it is assumed that the provisions of Section 25-F were not applicable as the petitioner had not completed 240 days at least the respondent was to comply with the provisions of Standing Orders applicable to the Board. There is no conclusive evidence on record as to when the Board was exempted from the operation of the said Standing Orders. Not only this admittedly the petitioner was working with the respondent since 1995. Persons juniors to him were retained by the respondent and such the act itself is in derogation of the provisions of section 25-G of the Act. In those circumstances even the lack of completing 240 days as is required under Section 25-B may not be fatal for the petitioner. In this behalf support can be elicited from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam & Ors. (1996) 5 SCC 419 wherein it had been held that the requirement of 240 days continuous service is not a condition precedent in respect of Section 25-G and 25-H of the Act.

16. The respondent thus have violated the provisions of Section 25- G of the Industrial Disputes Act, if nothing else. The plea of abandonment set up by the respondent is highly doubtful. Consequently the termination of the petitioner is set aside and quashed. As a sequel thereto he is ordered to be reinstated with benefits of seniority and continuity of service from the date of his termination. Since, there is no whisper in the testimony of the petitioner that he was not gainfully employed during the said interregnum. I do not wish to grant back-wages to the petitioner. The issues hereinabove are decided in the aforesaid terms.

RELIEF

17. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and seniority from the date of his termination, except back-wages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 1st day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA (H.P.)

Ref. No. : 56/2002
Instituted on : 16.2.2002
Decided on: : 16.6.2010.

Shri Prabhakar Singh S/o Shri Bhagwat Singh, C/o Smt. Manju Devi, Himachal Fibers Ltd., Village & P.O. Barotiwala, Distt. Solan, H.P.Petitioner

Vs

The Managing Director, M/s. Nipso Poly Fabriks Ltd, 30-31, Industrial Area, Mehatpur, Distt. Una, H.P.Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR
 For the Respondent : Sh. Virender Sharma, Adv.

AWARD

1. The following reference was received for adjudication from the appropriate Government:
 “Whether the termination w.e.f. 28.11.1998 of Sh. Prabhakar Singh S/o Shri Bhagwat Singh by M/s. Nipso Poly Fabriks Ltd. Mehatpur is legal and justified? If not, to what back-wages, seniority, service benefit and relief the concerned workman is entitled to?”
2. The case set out by the petitioner in his statement of claim is that he came to be appointed as a helper on 13.8.1993 by the respondent. After having served the respondent for 5 years he came to be promoted as senior helper w.e.f. 1.6.1997. He was however illegally terminated on 28.11.1998.
3. The petitioner was also elected as an executive member of the workers union namely Rashtriya Mazdoor Sangh. On 9.12.1997 the union had served a demand charter to the respondent.
4. The termination of the petitioner w.e.f. 28.11.1998 is further stated to be in violation of Section 9-A and 33-A of the Industrial Disputes Act (hereinafter referred to as the Act). Per the petitioner a dispute was pending conciliation before the Labour Inspector, Una and even before the Labour Court where the petitioner had moved for subsistence allowances, during the pendency of his suspension.
5. It is also the case of the petitioner that the charge-sheet was a counter blast to the union activities of the petitioner. It was based on false and fabricated allegations and no preliminary inquiry had been conducted by the respondent before issuance of a charge-sheet.
6. It is further the case of the petitioner that even the inquiry is illegal. The Inquiry Officer did not prescribe any proper procedure for the inquiry. No opportunity was granted to the petitioner and he was condemned unheard. The petitioner was not even afforded an opportunity to cross-examine the witness.
7. While contesting the claim the respondent inter alia raised the preliminary objections vis-à-vis non-joinder of necessary parties and the reference being bad.

8. On merits it is the case of the respondent that the petitioner had committed some misconduct and thereupon served a memo of charges containing eight different allegations. The petitioner amongst other charges was found responsible for having used filthy and abusive language against his superiors during the course of his duty. Besides that he was found to have manhandled and assaulted the security guard on duty. Since the offence committed by the petitioner was of serious and grave nature a complaint was lodged with the police besides initiating disciplinary action. The petitioner had been served with a regular charge-sheet, which was followed by a domestic inquiry conducted by an independent Agency. The petitioner was given full opportunity to defend himself. The petitioner defended himself in person as per his own wish.

9. It is further contention of the respondent that there was no dispute pending before any authority so as to attract the provisions of Section 33-A, neither there was any violation of the provisions of Section 9-A of the Act. The respondent thus sought the dismissal of the reference.

10. While filing the rejoinder the petitioner controverted the averments in the reply and reiterated those in the statement of claim.

11. I notice that the following issues came to be framed by my Ld. Predecessor on 3.6.2005.

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| 1. Whether the termination of the petitioner w.e.f. 28.11.1998 by the respondent is illegal and unjustified, as alleged? | OPP |
| 2. If issue No. (1) is proved in affirmative to what service benefits the petitioner is entitled to? | OPP |
| 3. Whether reference is bad as alleged? | OPR |
| 4. Whether petition is bad for non-implementing proper necessary parties as alleged? | OPR |
| 5. Whether petitioner was terminated after holding domestic inquiry against his grave misconduct, if so its effect? | OPR |
| 6. Whether domestic inquiry conducted by the respondent against the petitioner is against the principle of natural justice as alleged? | OPR |
| 7. Relief. | |

12. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

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| Issue No.1 : | Yes |
| Issue No.2 : | As per operative part below |
| Issue No.3 : | No |
| Issue No.4 : | No |
| Issue No.5 : | Yes |
| Issue No.6 : | Yes |
| Issue No.7 : | Allowed as per operative part of the award. |

REASONS FOR FINDINGS

ISSUES NO . 1, 2, 5 and 6

13. All the four issues are taken up together for discussion as they are co-related as a dispute hinges upon the termination of the petitioner based on a domestic inquiry.

14. The petitioner has impugned the domestic inquiry primarily on the ground that the dismissal thereof was violative of the provisions of Section 9-A and Section 33-A of the Act and was against the principles of natural justice. The petitioner had not been given ample opportunity to defend himself. So much so he was not even allowed to cross-examine the witness.

15. It is not in dispute that the termination of the petitioner proceeded on the basis of the domestic inquiry conducted by the respondent. Even the petitioner has admitted so while appearing as PW1.

16. A careful perusal of the case reveals that except for an application under Section 33-C (2) for the recovery of the subsistence allowances during pendency of the present inquiry, nothing was pending at the relevant time. The order dated 17.5.2004 passed by this Court shows that an application under Section 33-C (2) of the Industrial Disputes Act was pending before this Court from 9.10.1998 till 17.5.2004.

17. Though the requirement of the provisions of Section 33-C inter alia postulate that during the pendency of any conciliation proceeding or an industrial dispute the employer shall not alter or change the conditions

of the service of the workman or discharge or punishment him for any misconduct by dismissal save with the express permission in writing of the authority for which the proceeding is pending. Section 2-K defines the "industrial dispute". The invocation of the provisions of Section 33-C (2), however, does not turn the dispute actually into industrial dispute. It cannot be taken to mean that the application under the said provision can be termed as an industrial dispute capable of being refer under Section 10 of the Act. The provisions of Section 33-C are limited to certain rights which arise in favour of a workman either in pursuance to a settlement or a award or under the provisions of Chapter VA of VB. Therefore the provisions would not fall squarely within the ambit of "industrial dispute" as given in Section 2-K. It cannot therefore be said that an "industrial dispute" was pending in view of the pendency of the application under Section 33-C (2). As such the ground of the petitioner that no permission was sought from the Court cannot be sustained. The provisions of Section 9-A is otherwise not applicable keeping in view the fact that the domestic inquiry had been ordered against the workman. Moreover the termination is not a ground specified in the fourth schedule entailing notice for the change of condition of service under section 9-A.

18. The respondent has placed on record certain photocopies of documents including inquiry report, postal receipts, statement of witness and proceedings of the inquiry vide Ex. RW1/B. The proceedings on record show that the petitioner was present right from the inception till the culmination of the inquiry. The petitioner has even cross-examined the witness. The same is clear from the proceedings attached along with photocopies of the statement of witness placed on record. The aforesaid documents have neither been brought on record by any official of the respondent nor they have been tendered by the counsel.

19. The respondent however has examined only one Ram Dutt Sharma, Manager to substantiate the averments in the reply. Unfortunately the affidavit filed by the RW1 as evidence (Ex. RW1/A) does not even bear his signature. He has placed on record the one letter dated 7.4.1998 vide Ex. RW1-RX/B and the copy of the charge-sheet Ex. RW1-RX/A/. The other documents i.e. inquiry report, the proceedings of the inquiry and the photocopies of the statement of witness have neither been tendered nor placed on record by the witness. On the contrary the petitioner has placed on record a copy of the inquiry report vide Ex. P1/L which is also not signed by the Inquiry Officer.

20. The perusal of the charge-sheet Ex. RW1-RX/A shows that there were seven charges leveled against the petitioner. The inquiry report (Ex. P1/L) shows that the Inquiry Officer held that all the seven charges proved by para 19 thereof but held discussion in the inquiry qua charge no.1 above. There are no findings recorded qua other charges. Even otherwise the document i.e. the inquiry report on record is otherwise unsigned. Strangely as per Ex. RW1-RX/B one Shri R.K. Kaushal, Assistant Manager has been appointed as Inquiry Officer and even RW1 has admitted the same. Thereafter RW1 has feigned ignorance as to who was the inquiry officer. Strangely R.K. Kaushal was a complaint in the FIR against the petitioner. He further hastened to add when Satish Kumar was the presiding officer. There is no evidence placed on record as to how and under what circumstances Shri H.N.P. Kaushal come to be appointed as an inquiry officer. There are certain photocopies on record but it is not inferable as to whether they had been tendered by RW1 or the Ld. counsel for the respondent. None have done so. The said document cannot be linked to infer that the proceedings conducted against the petitioner were valid and legal.

21. The respondent should have exhibited the inquiry proceedings along with findings recorded by the Inquiry Officer so as to impeach the averments made by the petitioner or atleast placed on record to atleast prove that they were true and correct as per the original. The veracity of the documents is thus highly doubtful and not worth of reliance. The respondent has however failed to do so. They have failed to prove the misconduct of the petitioner before this Court. There is no legal evidence on record to remotely prove that the petitioner was given an opportunity to defend himself as averred in the statement of claim and that the inquiry was irregular and illegal.

22. For all the reasons discussed above I am constrained but to hold that the domestic inquiry conducted by the respondent against the petitioner was illegal, arbitrary and unjust. The respondent failed to prove that the petitioner had committed grave misconduct entailing his termination. Consequently the termination of the petitioner is held to be bad in the eyes of law. It is ordered that the termination of the petitioner is set aside and quashed.

23. However seeing the peculiar circumstances and facts of the case that an FIR had also come to be registered against the petitioner for manhandling the security guard, and even some inquiry was conducted against him indicting him. I deem it just and proper not to award back-wages to the petitioner. The issues are decided accordingly.

ISSUES NO. 3 and 4

24. Nothing has been urged nor anything has been brought to my notice as to why the reference is bad. Both the issues are decided against the respondent.

RELIEF

25. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed. He is ordered to be re-engaged forthwith along with continuity in service and

seniority from the date of his termination without any backwages. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 16th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
 CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. :81/2002
Instituted on :13.3.2002
Decided on : 25.5.2010.

Pradhan, Baijnath Tea Estate Mazdoor, Sangh, Baijnath, Distt. Kangra, H.P.

.....Petitioner

Versus

The Baijnath Tea Estate Co. (P) Ltd. Baijnath, Distt. Kangra, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N. L. Kaundal, AR,

For the Respondent : Sh. Sh. Rajinder Chaudhary, Adv.

AWARD

1. The appropriate Government seeks adjudication by this Court on the following point of Reference:

“Whether the termination of the services of 81 workmen as detailed in Annexure of Demand Notice of Pradhan, Baijnath Tea Estate Mazdoor Sangh, Baijnath by the Management of Baijnath Tea Estate Co. (P) Ltd. Baijnath, Distt. Kangra, H.P. w.e.f. 14.1.2001 without complying the section 25-F/25-N of the Industrial Disputes Act, 1947 is legal and justified? If not, what relief the affected workmen are entitled to?”

2. The statement of claim has been filed by the Baijnath Tea Estate Mazdoor Sangh. Per the petitioner union the respondent management has five tea plantations at Baijnath, Mahalpat, Banuri and Alhilal. There are 1.50 lakh plants and the management has a factory in Baijnath where it manufactures black tea. The management has employed more than 150 workers in the plantations/factory.

3. It is the case of the union that the 81 workmen whose names have been reflected in the demand notice were working with the management for the last 10-30 years. All the workmen had completed more than 240 days in each calendar year. However, their services were terminated w.e.f. 14.1.2001 without any charge-sheet, inquiry, notice or retrenchment compensation. The termination was stated to be in violation of the provisions of Section 25-F of the Act (hereinafter referred to as the Act). It is further the case of the union that the management have not sought any permission from the Government in respect of the retrenchment of 81 workmen and also violated the provisions of Section 25-N of the Act. The respondent management was also stated to have violated the provisions of Section 25-O of the Act as no permission was sought by the respondent from the Government while closing down the tea plantations and factory w.e.f. 1.5.2001. All the retrenched workmen were stated to be unemployed from the date of termination and had been earning Rs.1500/- and Rs.1600/- per month at the time of retrenchment.

4. On these premises the union has sought that the retrenchment order dated 14.1.2001 be set aside and quashed. Further seeking the reengagement of all the workmen along with continuity of service and other consequential benefits.

5. The respondent while contesting the reference inter alia raised the preliminary objections vis-à-vis maintainability, estoppel and the petitioner union having suppressed material fact from the Court.

6. On merits it was admitted by the respondent that it was having tea gardens at various places but it was denied that the factory mentioned by the petitioner union was manufacturing black tea. Per the respondent it had been closed 7-8 years back. Further, per the respondent they have been supplying tea leaves to different factories in district Kangra till June, 2001 and thereafter the respondent was forced to close the establishment as tea industry all over India was suffering a crisis. Moreover due to high rate of plucking tea leaves the respondent suffered huge losses. It was denied that the respondent had employed more than 150 workmen.

7. It was further denied by the respondent that the workmen remained continuously in service with them. The respondent was stated to have paid an amount of Rs.13,44,151/- to about 113 workmen on account of their wages and compensation and an amount of Rs.1,26,047/- towards their GPF contribution after a settlement had been reached between the workmen and the management before the SDO (Civil) Baijnath. Thereafter about 48 workers also paid wages and other emoluments through SDO (Civil). The petitioner had concealed this material fact and as such was estopped from filing the reference.

8. While filing rejoinder the contentions raised in the reply were denied and those in the statement of claim were reaffirmed by the petitioner.

9. I notice that my Ld. Predecessor had framed the following issues for determination on 31.12.2004:

1. Whether the termination of services of the petitioners w.e.f. 14.1.2001 is without complying the provisions of section 25F and 25-N of the I.D. Act by the respondent is illegal and justified? OPP
2. If issue No.1 is proved in affirmative, to what reliefs the petitioners are entitled to? OPP
3. Whether the present petition is not maintainable in the present form, as alleged? OPR
4. Whether the petitioners are estopped from filing the present petition by their acts and conduct as alleged. OPR
5. Relief.

10. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

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| Issue No.1 : | Yes |
| Issue No.2 : | The petitioners are entitled for reinstatement and continuity of service from the date of their illegal termination. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue : | Allowed as per operative part of the award. |

REASONS FOR FINDINGS

ISSUES NO. 1 AND 2

11. Both the issues are being taken up for discussion together as they are inter-related.

12. The termination of the 81 workmen referred to in the annexure of the demand notice is not specifically denied in the reply filed by the respondent management. It is very evasively pleaded in the reply that the factory had been closed 7-8 years back. It is further averred that the workmen never remained in continuous service with the respondent. It is further averred that the respondent management before closing their establishment had informed the workmen well in time and paid their dues and emoluments. About 113 workers were stated to have been paid an amount of Rs.13,46,151/- on account of their wages and compensation along with Rs.1,26,047/- towards GPF funds. Another 48 workers were also stated to have been paid their wages and other emoluments before the SDO (Civil), Baijnath.

13. The pleadings on record thus tacitly show that the respondent management had retrenched the workers in pursuance to a closure.

14. The testimony of Hem Chand Sood, a Director of the Baijnath Tea Estate Company Pvt. Ltd. (RW1) also clearly shows that the Estate was closed. It would be appropriate to reproduce a few lines of his testimony.

“The factory of Baijnath Tea Estate was closed 7/8 years back. No black Tea was manufactured in the factory. The tea leaves were supplied to different tea factories i.e. coop. Society tea factories also till June, 2001 and after that the Establishment was forced to close the Establishment also due to higher rate of plucking of tea leaves which resulted in huge loss.....”

15. It is further evident from the record that after the alleged retrenchment i.e. after 14.1.2001 some proceedings before the Sub Divisional Magistrate, Baijnath under the Payment of Wages Act had commenced and eventually on 28.2.2002 money had been paid by way of cheques to the workmen. As is clear from the testimony RW7 Sikander Kumar the proceedings had been initiated before the SDM (Civil), Baijnath on 30.4.2001 vide case No.1/2001 titled as Feek Devi vs. Baijnath Tea Estate and had culminated on 23.10.2002. Thus whatever payments were alleged to have been made by the management to the workmen was paid by them after the retrenchment.

16. The provisions of Chapter VB contemplated a special provisions relating to retrenchment by way of a closure in any establishment. The provisions of the Chapter as per the Section 25-K is applicable to all industrial establishments It would be apposite to refer to the provisions of Section 25-K.

25-K. Application of Chapter VB.- (1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.

(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.”

17. The provisions of Section 25-L further, inter alia stipulate that a “factory” as defined in clause 2(m) of the Factories Act is included in the term “industrial establishment”. It may further be appropriate to highlight that even a question whether an industrial establishment is of a seasonal character or not is dependant on the decision of the appropriate Government as per the provisions of Section 25-K of the Act.

18. The provisions of the Chapter further provide the condition precedent for retrenching workmen in pursuance to a closure. It further entails that the prior permission of the appropriate Government as per the requirements of section 25-O is an essential attribute of closure. Only after the said permission has been sought the management can resort to retrenchment and that too subject to other condition enumerated in clause (a) of the provisions of Section 25-N of the Act.

19. However the evidence on record more particularly the deposition of RW1 shows that the Board of Directors of the Company had passed a resolution to close the tea estate w.e.f. 1.5.2001 vide (Ex. P4) and had ordered the retrenchment of the labour without resorting to the statutory provisions of Section 25-O and 25-N. On 15.5.2001 the Sub Divisional Magistrate, Baijnath vide Ex. P3 had also brought the provisions of Section 25-N and 25-O to the notice of the management but still no steps had been taken by the management to undo the wrong.

20. In the case of closure of an industrial establishment, prior permission of the appropriate government is imperative, is well settled preposition of law. Support can ably be elicited by a judgment of the Hon’ble Supreme Court titled as M/s. Oswal Agro Ltd. and Anr. vs. Oswal Agro Furane Workers Union and Ors. , 2005 LLR 305. The Hon’ble Supreme Court has gone to the extent of holding that even in case a settlement is arrived inter se the employer and workman, even it would not prevail over the statutory requirements as contained under Section 25-N and Section 25-O of the Act. In the case in hand there was no settlement arrived inter se the parties. The retrenchment was on the basis of an unilateral decision of the Board of Directors taken vide Ex. P4 on 24th March, 2001. The retrenchment of the workmen as such was per se violative of the statutory provisions of the Industrial Disputes Act and as such vide-ab-initio. Not only this the respondent management has examined certain workmen as RW2 to RW6 and RW8 to RW12 to portray that they had received total amount due from the Baijnath Tea Estate Company and they have not disputed whatsoever regarding wages, sick leave and annual leave and the provident funds and that the Baijnath Tea Estate Company has closed the operation of the establishment in the year 2001 and before closing the same all the amount due were paid to them and now they were working under the Contractors who were responsible for the payment of their wages etc. It clearly emerges from their testimony that the tea plantations are still being run by the Contractors. No doubt the amounts due to the workmen atleast on account of the wages had been paid to the workmen but it was after the closure and on the intervention of the SDO (Civil), Baijnath before whom the workmen had initiated proceedings under the wages Act. Even assuming the said act of the management is considered to be a settlement, though it is not one under Section 12 (3) of the Act but as has been held by the Hon’ble Supreme Court in M/s. Oswal Agro Ltd. and Anr. vs. Oswal Agro Furane Workers Union and Ors., discussed hereinabove supra it would not prevail over the statutory requirements of the Section 25-N and 25-O. Factually, as per record the payments had been made by the management after the retrenchment, as is clear from the testimony of RW7, discussed above.

21. Though there is no sufficient evidence to hold that the provisions of Section 25-F of the Act were complied with by the respondent management but even if had they been complied with, the retrenchment would still have been bad. As the retrenchment in the present case was to proceed on the basis of the provisions of Section 25-N of the Act. The respondent management has not taken any steps in consonance with the requirements of the provisions of

section 25-N and 25-O of the Act. It is thus manifestly clear that the retrenchment of the workmen w.e.f. 14.1.2001 is in gross violation of the provisions of Section 25-N and 25-O of the Industrial Disputes Act. RW1, Hem Chand Sood has deposed that the permission from the Govt. for the closure of the establishment was obtained. It was obtained in the year 2001, however he has not brought any record in this behalf. Nothing has otherwise been placed on the record. Ex. P3 on record belies and falsifies the testimony of RW1. The testimony of RW1 is thus of not much credence. The action of the respondent is not sustainable and is accordingly set aside. The retrenchment of 81 workmen is set aside and quashed.

22. As a sequel thereto the respondent management is directed to reinstate the workmen retrenched by them w.e.f. 14.1.2001. Though the initial onus was on the petitioners to prove that they were not gainfully employed during their forced idleness but except for a sweeping statement made by the PW1, the Pradhan of the union that all of them were unemployed since they were retrenched does not seem to be sufficient to hold that the workmen were not gainfully employed during the said interregnum. I am thus constrained not to award any back-wages to the workmen. They shall however be entitled to seniority and continuity of service from the date of illegal termination. The issues are decided accordingly.

ISSUE No. 3

23. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE NO. 4

24. The rule of estoppel is not attracted in this case. The Ld. counsel appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

25. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the 81 workmen (mentioned in Annexure to the Demand Charter) is set aside and quashed. The said workmen are entitled for reinstatement and continuity of service from the date of their illegal termination, except back-wages. The respondent shall reinstate the petitioners forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 25th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-
LABOUR COURT, DHARAMSHALA, H.P.**

Ref No. : 85/2009
Date of Institution : 26.2.2009
Date of decision : 20.5.2010

Shri Prem Chand S/o Shri Relu Ram, R/o village Gorat, P.O. Sayoh, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Prem Chand S/o Shri Relu Ram, by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 2.6.1999 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon’ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "*industrial establishment*" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
- (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.
- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now adverting to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic cannons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/B is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

“25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression “continuous service” has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Not only this the perusal of the record more particularly the seniority list Ex. RW1/C categorically shows that the respondents have engaged daily waged beldars after the petitioner was shown the door. He came to be employed on 2.6.1999. Innumerable people came to be appointed as daily waged beldar thereafter. The provisions of the Act inter alia stipulate that an employer shall follow the principle of “last come first go” as per the requirements of the provisions of Section 25-G of the Act, which reads as under:

“25-G. *Procedure for retrenchment.*- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman”.

24. The question of the juniors having been retained by the respondent is not only admitted by the respondent in paragraph 4 of the reply but has also reflected as so in the seniority list of one Shashi Kant S/o Shri

Bihari Lal (Ex. PW1/B), who had been appointed as a beldar in January, 2000. The reply and the Ex. PW-1/B on record lends assurance to the allegation of the petitioner that juniors had been retained by them, while his services have been dispensed with.

25. The factum of Shashi Kant being junior to the petitioner has not only been testified by the petitioner but even the Executive Engineer, Dharampur Shri Naresh Kumar Sharma who while appearing as RW1 has sworn by the seniority list placed on record vide Ex. RW1/C. The name of Shashi Lal S/o Shri Bihari Lal appears at serial no.646 and his date of engagement is reflected as 6.4.1999. Even if the said document is not given precedence over Ex. PW1/B wherein the seniority of Shashi Kant has been reckoned w.e.f. January, 2000, it is clear that the said Shashi Kant had been engaged after the petitioner. He was thus junior to the petitioner and having been retained as a beldar, the action of the respondent was indeed violative of the provisions of Section 25-G of the Act.

26. Though a vain attempt was made by the Ld. authorized representative for the petitioner to contend that since the respondent had engaged beldars even after his retrenchment, the action of the respondent is also a violative of the provisions of Section 25-H of the Act. No doubt as per seniority list for beldars as existing on 31.3.2008 (Ex.RW1/C) one Inder Singh, Mamta Devi and Ajay Kumar had been engaged on 1.1.2000, 6.4.2000 and 1.12.2003 respectively. But as is apparent from the record that all the three had been re-engaged on compassionate ground. In these premises it may be difficult to hold that the action of the respondent was violative of the provisions of Section 25-H of the Act. However it would be apposite to refer that in other matters relating to the retrenchment based on the orders of the same specified authority evidence was led to prove that beldars had been engaged even in the year 2006. Since the said evidence is not a part of the record on this file, it may not be legal to record a finding on the basis of the same.

27. However, the infraction of the provisions of Section 25-G is in itself fatal to the respondents. Even if the provisions of Section 25-F are not attracted the provisions of Section 25-G is independently sufficient to protect the rights of workmen. The non-application of 25-F shall not prejudice the right of the workmen under the provisions of Section 25-G. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court, titled as Central Bank of India vs. S. Satyam and Ors. (1996) 5 SCC 419.

28. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

29. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

30. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

"It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

31. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.LO/MZ/IV/ID/154/06 & 959/2007-10021, dated 4.11.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/2008-Mandi dated November 25, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

32. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

33. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

34. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 148/2006
Date of Institution : 30.8.2006
Date of decision : 20.5.2010

President/Secretary, Bijlee Mazdoor Sangh, unit Shanana, Joginder Nagar, Distt. Mandi (H.P.).

....Petitioner

Versus

1. The Superintending Engineer, P.S. Circle Shanana Power House Joginder Nagar, Distt. Mandi (H.P.).

2. The Resident Engineer P.S.E.B. Shanana Power House Joginder Nagar, Distt. Mandi (H.P.).

....Respondents

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, A.R.

For the Respondents : Sh. Sunil Chaudhary , adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the demand raised by President/ Secretary Bijlee Mazdoor Sangh unit Shanana, Joginder Nagar, District Mandi H.P. vide their demand notice dated 13-5- 2004 (Copy enclosed) from the (1) The

Superintending Engineer, P.S.E.B., Circle Shanan Power House Joginder Nagar, District Mandi, H.P. (2) The Resident Engineer, P.S.E.B., Shanan Power House, Joginder Nagar, District Mandi, H.P. are legal and justified? If yes, what relief and consequential service benefits and amount of compensation the aggrieved workman is entitled to?"

2. The President of Bijlee Mazdoor Sangh (BMS) has preferred a statement of claim in furtherance of the reference. As per the union, in pursuance to demand raised by them the Punjab State Electricity Board granted Shanan allowance equivalent to six increments to the officers, regular and workcharge staffs stationed at Shanan, Joginder Nagar and Barot allowance equivalent to eight increments vide letter No.75191-75391/Fin-743 dated 1-6-1995. The aforesaid allowances were paid by the respondent till 25-10-2001.

3. It is further the case of the union that in pursuance to the 5th pay Commission revised pay scale came to be paid by the respondent w.e.f. 1-1-1996 but the aforesaid allowance payable to the employees at Shanan and Barot on the basis of the revised pay scale were not paid to them. Rather vide order dated 25-10-2001 in place of the allowance a consolidated amount came to be paid on the basis of different slabs fixed by the respondent. The said action of the management in altering the service condition was stated to be bad in the eyes of law being in violation of Section 9-A of the Industrial Dispute Act, 1947 (hereinafter referred to as the Act).

4. The second demand raised by the union related to the non-payment of over time to the employees working at Barot. The workman working at Barot were stated to be not being paid the overtime as per section 59 of the Factory Act, 1948 after January, 2004 and instead compensatory leave were granted to them in lieu thereof.

5. The union thus prays for a direction to the respondent to pay the allowance payable at Shanan and Barot as per first notification w.e.f. 1-1-1996 and to pay the arrear thereto along with 12% interest from 26-10-2001 till realization and to pay the overtime to the workman at Barot as per section 59 of the Factory Act w.e.f. Jan., 2004.

6. The respondent while controverting the claim inter-alia raised preliminary objection vis-à-vis the limitation, the reference having become infructious in view of a circular dated 23-6-2006 whereby the workman in Shanan and Barot had been again allowed 6 increments as hardship allowance and that the provisions of the Factory Act were not applicable in the case at hand.

7. On merit it is the case of the respondent that six and eight increments had been given to the workmen at Shanan and Barot respectively vide a circular dated 1-6-1995. The same was paid till 24-10-2001. Thereafter the benefit of allowance at Shanan & Barot had been given on slab system as per circular dated 25-10-2001. The respondent again vide a circular issued on 23-6-2006, effective from 20-6-2006 had granted the benefit of six increment to the workmen working at Barot and Shanan as per B.B.M.B's pattern. The respondent was thus stated to be offering benefits to the workmen as per their demand charter

8. As regards overtime, it is averred by the respondent that the employees are working out side the Power House as well as the Substations and as such do not fall under the Factory Act. The respondent is thus not liable to pay any overtime. More over, since no body has worked more than the prescribed time they are not entitled to any overtime. In case work is got undertaken by any one during holidays/ emergency he is granted compensatory leave as per rules. The respondent thus sought dismissal of the reference.

9. While filing the rejoinder the union controverted averments in the reply and reiterated those in the claim.

10. Based on the aforesaid pleadings my Ld. Predecessor had framed the following issues for determination:

1. Whether the demand raised by the petitioner/President Bijlee Mazdoor Sangh unit Shanan, Joginder Nagar District Mandi, H.P. (vide their demand notice dated 13- 5-2004) are legal and justified. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to?OPP.
2. Whether the claim petition suffers from the vice of delay and latches.OPR
3. Whether the reference petition is not maintainable.OPR
4. Relief.

11. While filing the rejoinder the union controverted the averments in the reply and reiterated those in the claim.

12. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus;

Issue No. 1	Yes
Issue No.2	No
Issue No.3	No
Issue No.4	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE 1

13. The statement of claim filed by the union was based on the demand raised in the charter annexed along with the reference. The petitioners have also placed the same on record vide Ex. P1 through Sushil Kumar while appearing as PW1.

14. It is not disputed by the respondent that initially Shanan allowance equivalent to six increments were paid to the officers, regular and workcharge staff headquartered at Shanan, Joginder Nagar and Barot allowance equivalent to eight increments headquartered at Barot were paid to the employees vide circular dated 1-6-1995 issued by the Punjab State Electricity Board. The said notification is on record as annexure R2 and Ex. RX/B.

15. Eventually a fixed lump sum amount came to be paid as Shanan and Barot allowance as per the respective slabs fixed by the Board vide circular dated 25-10-2001. The said circular is Ex. Rx/C on record. To some extent this anomaly has been further sought to be rectified by the Board by allowancing six increments as hardship allowance to the officers and regular staff both headquarters at Shanan and Barot vide circular dated 23-6-2006.

16. The respondent has examined one Om Parkash U.D.C. as RW1. He has not disputed the factual position discussed above as is clear from his evidence by way of affidavit (Ex.R1/A). The only short question which is required to be determined is where the unilateral Act of the respondent in changing the increments to a fixed slab would come within the purview of change or variation in the terms and conditions of service. The simple answer is that any withdrawal or change of allowance of the workmen would certainly tantamount to change in the condition of service. In that view of the matter, the management of the Punjab State Electricity Board ought not to have withdrawn unilaterally the allowance payable to the workman without issuing a notice as envisaged under section 9-A of the Industrial Disputes Act. Admittedly the workmen were offered six and eight increments respectively for worker at Shanan and Barot respectively as per notification dated 1-6-1995 (Ex. RX/B). Judicial notice can be taken of the fact that the recommendation of the 5th pay Commission came into effect w.e.f. 1-1-1996. The respondent rather than granting increments on the revised pay scale issued circular on 25-10-2001 fixing the allowance of the employees as a lump sum amount on different slabs fixed by the respondent. No notice whatsoever had been issued by the respondent. It was incumbent upon the respondent to have issued a notice in the prescribed manner before proposing any change in the condition of service of the workmen. The change in compensatory and other allowances are specifically mentioned in the 4th schedule and any change thereto in respect of workman will signify change in the condition of service as per the section 9-A, of the Act. The unilateral change made by the respondent vide circular dated 25-10-2001 (Ex. RX/C) is thus illegal being in violation of the statutory provision of Section 9-A of the Act. Any change thereto effected in super session of the said order vide another circular dated 23-6-2006 is also bad on the same count.

17. Not only this the circular dated 25-10-2001 in fact deprived the workmen of the allowances as it pertains only to regular employees headquartered at Shanan and Barot. In that view of the matter it had unilaterally precluded the workmen from getting any allowance whatsoever. It was thus not a change in service condition but a total denial of rights to the work charged staff which were otherwise being enjoyed by them as per the earlier order dated 1-6-1995.

18. Adverting to another aspect of the matter i.e. relating to over time. It is not disputed that the Shanan Power House is registered under the Factory Act as is abundantly clear from the deposition of RW1. The workmen at Barot are also admittedly the worker under the Resident Engineer of the Punjab State Electricity Board. The workmen at Shanan Power House are being given overtime whereas the workmen at Barot are being given compensatory leave in view of the over time. It is also implicitly clear from the testimony of RW1. That being so the action of the respondent is clearly discriminatory and against the provision of the section 59 of the Factory Act. In fact compensatory leave is granted to the employees only when he is engaged for work on a gazetted or a national holiday. If a workman is asked to work overtime he is required to be paid the same as per requirement of The Factory Act. Since the respondent Board is generating power, it clearly false under the provision of section 2 (k) of the Factory Act, significantly the definition of a "worker" as given in section 2 (l) of the factory act is couched in the widest terms as such the petitioners will have to be treated as a worker, as per the requirements of the Factory Act, too. The plea of the respondent that the workmen employed in Barot were working out side the power house thus will not mean that they are not entitled to overtime. Any "worker" whether employed outside or inside the sub-station will have to come within the legal parameters of the definition of a "worker".

19. For all the aforesaid reason discussed above I hold that the demands raised by the petitioner union are legal and justified. As a sequel thereto the respondent is directed to grant Shanan allowance and Barot allowance as per the circular dated 1-6-1995 to the workmen who were stationed at Shanan and Barot respectively and as per the revised pay scales w.e.f. 1-1-1996. The workmen shall also be entitled to arrear on the basis of the revision made in pursuance to the 5th pay Commission w.e.f. 1-1-1996 and the workmen employed at Barot will be entitled to overtime as per the requirement of Section 59 of the Factory Act. All workmen working at Barot after 1st Jun, 2004 shall be entitled to the overtime as per section 59 of the Factory Act, 1948.

20. The issue above is thus decided in favour of the petitioner and against the respondent.

Issue 2

21. Though the respondent has raised objection that the reference is barred by limitation but there is no evidence on record to show how the same is hit by the vice of delay. The onus was on the respondent to prove the same. Except for one UDC none has been examined by the respondent and even the said UDC while appearing as RW1 has not deposed as to how the reference was barred by limitation. On the contrary the petitioners have placed on record a demand notice dated 13-5-2007 (annexure P1 and Ex.Rx/A). The change in service condition were effected in the year 2001 by the respondent. The union initially might have raised the matter with the respondent's Board. Only after it failed to yield any results that the union might have raised the dispute before the conciliation officer on 13-5-2004. Not only this the respondent did not agree to any conciliation before the Labour Officer but eventually did succumb to the demand of the union by superseding the circular dated 25-10-2001 vide an office order dated 23-6-2006 and partially agreed to the demands of the union. That being so it cannot be inferred that the reference is barred by limitation. The issue is accordingly decided against the respondent. It cannot be said to be stale claim.

Issue 3

22. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

23. For all the foregoing reasons discussed the reference is allowed. As a sequel thereto the circular dated 25-10-2001 issued by the Deputy Secretary Finance, Punjab State Electricity Board is quashed and set aside. The respondent is further directed to grant the increments payable to the workmen stationed at Shanan and Barot as per the notification dated 1-6-1995 w.e.f. 1-1-1996 as per the revised pay scales issued in pursuance to the recommendations of the 5th pay commission. The workmen shall be entitled to arrear on the said count w.e.f. 1-1-1996. The workmen who had been working at Barot w.e.f. January, 2004 shall also be entitled to the overtime as per the provision of Section 59 of the Factory Act, 1948. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cumLabour
Court, Dharamshala,
H.P.

**IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, DHARAMSHALA (H.P.)**

Ref. No. : 149/2006
Instituted on : 2.11.2006
Decided on : 7.5.2010.

Shri Pritam Chand S/o Shri Prem Singh, R/o Village Papela, P.O. Majhwar, Tehsil Ghumarwin, District Bilaspur, H.P.Petitioner

Vs

The Divisional Forest Officer, Forest Division Bilaspur, District Bilaspur, H.P.

.....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. S.S. Sippy, AR.

For the Respondent : Sh. H.S. Dhiman, Ld. Dy. D.A.

AWARD

1. The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of Shri Pritam Chand S/o Shri Prem Singh workman by the Divisional Forest Officer, Forest Division Bilaspur, H.P. w.e.f. 01.09.04 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?”

2. The case set up by the petitioner is that he was appointed as a daily waged worker on 1.4.1998 in Bilaspur Sadar and continued to work as such till 9.10.2003. His services were terminated verbally on the said date without serving him with any notice. He immediately approached the Labour Officer on 22.12.2003 and raised an industrial dispute. He was thereupon reengaged by the respondent on 6.2.2004 and eventually on 1.9.2004 his services were again dispensed with.

3. The respondent as per the petitioner having retained the following persons junior to him:

1. Shri Mehar Singh
2. Sh. Bhura Ram
3. Sh. Raj Kumar
4. Shri Prem Lal
5. Shri Dharam Singh
6. Shri Bal Kishan
7. Shri Daulat Ram
8. Shri Kishan Chand
9. Shri Bali Ram
10. Shri Bhajan Singh
11. Shri Mast Ram
12. Smt. Usha Devi

4. The petitioner thus assailed the action of the respondent of dispensing with his services w.e.f. 1.9.2004 being in violation of the provisions of Section 25-B, G, H and F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). He thus sought reinstatement with all consequential benefits.

5. The respondent while contesting the claim raised the preliminary objection that the petitioner had not approached the Court with clean hands and had been intentionally withheld material facts from the Court.

6. On merits it was the case of the respondent that no doubt the petitioner was appointed on daily wage basis in the year 1998 but had not been dis-engaged from work. In October, 2003 all the daily wagers of Sadar Forest Range were deputed to Kalol Forest Range. The applicant had not joined his duty in Kalol. He had rather abandoned the work after disobeying the orders of his superiors. He had approached the Range Forest Officer Sadar for his re-engagement on 5.2.2004 and he was re-engaged immediately. However, the petitioner himself abandoned work after August, 2004. The petitioner was time and again asked to resume work but the petitioner had refused to take notice. Eventually the Range Forest Officer Sadar had sent a registered notice to the petitioner on 26.4.2005 but he failed to report for duty.

7. Out of the workers mentioned in the statement of claim Bhura Ram, Dharam Singh, Daulat Ram and Mast Ram were stated to be working in Sadar Forest Range and all were stated to be senior to the petitioner. The respondent thus sought dismissal of the claim.

8. While filing rejoinder the contentions raised in the reply were denied and those in the statement of claim were reiterated by the petitioner.

9. The short and simple pleadings culminating in the framing of the following issues:

1. Whether the termination of the claimant from service by the respondent is proper and justified? OPP
2. If the above issue is proved in affirmative, to what relief of service benefits to the petitioner is entitled to? OPP

3. Whether the claim petition is maintainable before this court?
4. Relief.

OPR

10. On the basis of the close and analytical examination of the pleadings, proof and other materials placed on record, the issue-wise findings may be returned thus:-

REASONS FOR FINDINGS

ISSUES 1 and 2

11. Both the issues are being taken up together as they are correlated and to avoid repetition.

12. The claim of the petitioner simplicitor is that his services were dispensed with by the respondent w.e.f. 1.9.2004. While appearing as his own witness the petitioner has reiterated the same and further testified that initially he was terminated on 9.10.2003 and after having raised an industrial dispute, he was re-engaged by the respondent on 6.2.2004. Eventually he was thrown out from service on 1.9.2004.

13. On the contrary it is the case of the respondent that the petitioner had himself abandoned job. In this behalf it is the case of the respondent that the concerned B.O and Forest Guard have been requesting the petitioner to resume work but the petitioner has refused to do so. He was even issued a notice by the BO Panjgain on 24.4.2005 but he had refused to receive the same and thereafter a registered notice had been sent to the petitioner on 26.4.2005 to join the nursery but he did not resume work. The respondent had in this behalf placed on record a copy of letter dated 26.4.2005 which was stated to have been sent by registered post to the petitioner as Ex. RW1/A. Apart from the same Annexures A1 and A2 which are stated to be notices sent to the petitioner were annexed along with the reply filed by the respondent. Both the notices do not carry any date. The alleged notice Ex. RW1/A which was purportedly sent by registered post no receipt of the registration thereof or RAD has been placed on record.

15. Even otherwise, if the said Exhibit i.e. Ex. RW1/A is to be considered a show cause notice in respect of abandonment, the same has been admittedly been issued after months of the petitioner having left job. After 26.4.2005 no final action in respect of dis-engagement of the petitioner was taken. Another aspect which is intriguing is that many documents have been annexed along with reply by the respondent to show that the department had been taking steps of reporting the absence of the petitioner and or even sending a notice to the petitioner but none except the registered notice Ex. RW1/A has been proved and placed on record by RW1, the DFO. It cause a serious doubt on the purported notice Ex. RW1/A. All other documents placed on record do not bear any date whatsoever. Even otherwise neither the Ranger nor the BO have been examined to prove the averments made in the reply. The ground of abandonment thus seems to have been set up merely to frustrated the claim of the petitioner.

16. The statement showing details of daily waged workers of Bilaspur Forest Division which has been placed on record as Ex. RW1/C shows that the respondent had even appointed daily wagers as late as in the year 2004. Admittedly the petitioner was appointed initially in the year 1998. He was in fact thus senior to many workmen appointed thereto in the year 2004 when the services of the petitioner was dis-engaged. It was in fact the juniors who had to first make away. The plea of abandonment taken by the respondent otherwise seem to be doubtful as the petitioner has placed on record the copy of demand notice preferred by him on 22.12.20003 as mark A. If that was so, the issuance of the purported notice vide Ex. RW1/A becomes shrouded with doubt. It seems to have been issued after a dispute had been raised by the petitioner. The non mention of dates in the other Annexures further fortifies the doubt.

17. Even otherwise, as per the provisions of Section 25-H retrenched workers have to be given an option when new workman were employed by the respondent in the year 2004. Even the said was not resorted to. The action of the respondent thus was also in violation of the provisions of Section 25-G and 25-H of the Industrial Disputes Act. For the aforesaid reasons it has to be inferred that the termination of the services of the petitioner was unjustified and illegal. It was in violation of the provisions of the Industrial Disputes Act and as such liable to be set aside. It is ordered accordingly.

18. However, there is no whisper to the testimony of the petitioner that he was not gainfully employed during his forced idleness. Since the initial onus was on the petitioner to prove the same and having failed to do so. I am not inclined to grant back-wages to the petitioner.

ISSUE 3

19. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference in not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

RELIEF

20. For the foregoing reasons discussed hereinabove supra, the reference is allowed. The termination of the petitioner is set aside and quashed being in violation to the provisions of Sections 25-G and 25-H of the Act. He is ordered to be reinstated without any back-wages. The respondent shall reinstate the petitioner within 90 days from today. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to the record room. Announced in the open Court today the 7th day of May, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
H.P. Industrial tribunal-Cum-
Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 643/2008
Date of Institution : 29.10.2008
Date of decision : 20.5.2010

Shri Pritam Singh S/o Shri Bajira, R/o Village Chowk, P.O. Deo Baradla, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPPWD, Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P.

....Respondent

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. N.L. Kaundal, AR

Sh. Vijay Kaundal, Adv.

For the Respondent : Sh. Sanjeev Katoch, Ld. Dy.D.A.

AWARD

The following reference was received for adjudication from the appropriate Government:

“Whether retrenchment of services of Shri Pritam Singh S/o Shri Bajira by the Executive Engineer, HPPWD Division Dharampur, Tehsil Sarkaghat, Distt. Mandi, w.e.f. 08.7.2005 without following the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above Ex-Worker is entitled to from the above employer?”

2. The case of the petitioner, as it emerges from the statement of claim is that he was appointed as a daily waged beldar by the respondent on 2000 in Dharampur Division of HPPWD. He continued to work as such till 7.7.2005 and his services were dispensed with illegally w.e.f. 8.7.2005.

3. It is further the case of the petitioner that the respondent had maintained no seniority and person juniors to the petitioner have been allowed to continue as beldars. The respondent had violated the principle of “First come, last go”. The action of the respondent is violative of the provisions of Sections 25-N, 25-G and 25-H. The petitioner alleged that about 35 persons junior to him namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal etc. who were appointed in November, 1998 and even later thereto i.e. 1.1.2000 (Shashi Kant) 1.12.2003 (Ajay Kumar) and Roshani Devi appointed on 4.7.1999 have still being retained by the respondent.

4. The petitioner has further impugned the notification issued by the Government of H.P. dated 14.2.2005 whereby the State of H.P. had conferred powers of the “specified authority” as envisaged under the provisions of Section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) on the Chief Engineer, Central Zone Mandi. The petitioner further averred that since the Chief Engineer was directly related with the employment of the petitioner and as such the action of the State of H.P. in appointing as specified authority under

the Act was per se legal. The Chief Engineer was as interested party, the notices issued to the petitioner under Section 25-N of the Act were thus illegal. The workmen had filed a Civil Writ Petition before the Hon'ble High Court of H.P. vide CWP No.486/05 and during the pendency of the same the State rescinded the notification dated 14.2.2005 and the said powers was thereupon conferred upon the Labour Commissioner. Per the petitioner the aforesaid notification dated 14.2.2005 had been issued merely to retrench the petitioner and other workmen in Dharampur division.

5. It is further averred by the petitioner that he has completed 240 days during the preceding 12 calendar months prior to his termination.

6. The petitioner thus seeks that the notification dated 14.2.2005 under Section 25-N be declared null and void and the petitioner be ordered to be reinstated with full back-wages, seniority and other consequential benefits. The respondent with the malafide intentions in an illegal and arbitrary manner ordered the retrenchment of about 1636 daily waged workmen after exercising power wrongfully under Section 25-N of the Act.

7. The respondent while contesting the claim of the petitioner has inter-alia raised the preliminary objections of the reference being not maintainable, it being hit by delay and laches, suppressio veri and the petitioner being estopped by his act and conduct from filing the claim.

8. On merits without primarily disputing the factual narration it is the case of the respondent that the services of the petitioner has been dispensed with as per the provisions of the Act after the specified authority-cum-Chief Engineer (CZ) Mandi had given permission for retrenchment of 1087 workmen out of the total of 1636, after following the provisions of Section 25-N of the Act. The petitioner and other workmen were stated to have been retrenched after having been given three months basic pay in lieu of notice and retrenchment compensation as provided under the Act.

9. It is also averred by the respondent that the retrenchment was necessitated because of surplus-age of labour and paucity of funds with the department. Further per the respondent a large number of labourers have been indiscriminately engaged on bifurcation of the Dharampur division out of Sarkaghat division w.e.f. 7th November, 1998 till 6/1999 whereby 3734 additional people were employed in the division taking the total strength of labour to 4045. The department was thus being constrained to maintain the labour strength out of the non-plan expenditure. Thus, to avoid financial hardship to the department action had been initiated under Section 25-N by the respondent. The retrenchment of the petitioner and other workmen was thus stated to be in accordance with the provisions of the Act.

10. While filing rejoinder the petitioner controverted the averments in the reply and reiterated those taken in the statement of claim.

11. Based on the pleadings the following points came to be framed for determination:-

- | | | |
|----|--|-----|
| 1. | Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief the petitioner is entitled to? | OPP |
| 2. | Whether the petition is not maintainable, as alleged. | OPR |
| 3. | Whether the petition suffers from the vice of delay and laches. | OPR |
| 4. | Whether the petitioner is guilty of suppressio veri. | OPR |
| 5. | Whether the petitioner is estopped from filing the claim petition by her act and conduct. | OPR |
| 6. | Relief. | |

12. On the basis of the close analytical analysis of the pleadings, evidence and other attendant material placed on record, my findings on these issues are as under:-

- | | |
|-----------|---|
| Issue 1 : | Yes. The petitioner is entitled to reinstatement, along with Rs.50,000/- as a lump sum amount in lieu of backwages, litigation expenses and compensation with continuity of service from the date of termination. |
| Issue 2 : | No. |
| Issue 3 : | No |
| Issue 4 : | No |
| Issue 5 : | No |
| Relief. : | The petition allowed partly per operative part of the award. |

REASONS FOR FINDINGS

ISSUE NO. 1

13. It is not disputed by the respondent that the petitioner was not employed as a beldar. The factual narration therefore does not require much deliberations. The case of the respondent simpliciter is that due to surplus

manpower the respondent resorted to the special provisions as enunciated in Chapter VB of the Act for retrenchment of the petitioner and other workmen serving in Dharampur Division of HPPWD, Mandi. This is the pith and substance of the respondent's case. In this behalf the State appointed the Chief Engineer, Central Zone, Mandi to be the "specified authority", who allowed the respondent to retrench the petitioner and roughly a thousand other workmen.

14. It would be apposite to highlight the provisions of Section 25-N, under which the petitioner has been retrenched. It appears in Chapter VB of the Act which relates to special provisions relating to lay-off, retrenchment and closure in certain establishments. This section refers to a workman employed in any industrial establishment to which applies Chapter VB of the Act. The applicability of this Chapter is governed by Section 25K which provides that the Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of Chapter VB defined by clause (a) of Section 25L, which reads:

"25L (a) "industrial establishment" means-

- (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);
- (ii) a mine as defined in clause (j) of subsection (1) of section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

15. The question that arises for determination is: Whether or not Dharampur Division of Public Works Department is an 'industrial establishment' within the meaning of clause (a) of Section 25L of the Act. The answer, to my thinking, is in the negative. The expression "factory" occurring in clause (a) of Section 25L is defined in Clause 2(m) of the Factories Act, 1948 thus:

"(m) "factory" means any premises including the precincts thereof-

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

16. The parties' pleadings are non-existent in such averments as may show Dharampur Division of HP.PWD wherein the petitioner was engaged to be a "factory" as defined above. Also, there is nothing to suggest that in the said Division some manufacturing process is/was being carried on with the aid of power, or is ordinarily so carried on. Also, there is nothing to show that in any part of the said Division some manufacturing process is/was being carried on without the aid of power, or is ordinarily so carried on. Dharampur Division of HP.PWD, particularly such area thereof where the petitioner was engaged also cannot be said to be an "industrial establishment" within the meaning of section 25L (a) of the Act. Section 25N of the Act under which the petitioner's services were dispensed with, in its material part reads:

"25N. *Conditions precedent to retrenchment of workmen.* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-

- (i) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
 - (ii) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf"
- (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

- (3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.
- (4) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him."

17. Once Dharampur Division of HP.PWD, particularly such location where the petitioner was said to have been engaged, is not proved to be an "industrial establishment" within the meaning of Section 25L (a) of the Act, the petitioner's retrenchment under the above provisions cannot be said to be lawful.

18. No doubt, ordinarily, it is the management which has to determine the dead weight of uneconomic surplus-age and order retrenchment. But it has to be bonafide. The process by which the said determination is made should look to be fair, proper and devoid of any ulterior motive. It should be free of the vice of capriciousness. The authority having been vested in the Chief Engineer, however brings the conduct of the respondents into doubt. Seemingly it makes the act of the respondent actuated with improper motive and treatment being met to the workmen as "malafide".

19. Now advertent to another interesting aspect which stares one at the face and ex-facie seems to be against the cardinal and basic principle of law. The notification under Section 25-N has authorized none else but the Chief Engineer, HPPWD Central Zone, Mandi to be the "specified authority" from whom the respondent 3 i.e. the Executive Engineer HPPWD, Dharampur was to take permission for the retrenchment of the petitioner and other workmen. The Chief Engineer being head of the zone and in the present case being directly responsible for the administration of Dharampur division has been notified to be the specified authority. In a sense he has been made a judge in his own cause. It is not only against the principles of law but against the basic canons of natural justice. The action of the State appointing the Chief Engineer of the Central Zone as specified authority was thus ipso facto illegal and as it emerges from the pleadings on the record, the State had itself withdrawn/rescinded the said notification. It is thus to be held that it was indeed void ab initio. Any action in pursuance to the said notification was and is bad in the eyes of law and the order dated 17.6.2005 passed by the Chief Engineer as specified authority, vide Ex.RW1/A-1 is ex-facie illegal.

20. The respondent to retrench the petitioner on account of his being surplus ought to have taken recourse to the relevant provisions contained in Chapter VA of the Act which deals with lay-off and retrenchment. One of the sections enumerated in this chapter is 25F which lays down conditions precedent to retrenchment of workmen. It says:

"25-F. *Conditions precedent to retrenchment of workmen.*- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

21. In view of these provisions, no workman employed in any industry, who has been in continuous service for not less than one year, can be retrenched by the employer unless he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of notice. The expression "continuous service" has been defined under Section 25B of the Act, which in its material part reads:

“25B. *Definition of continuous service.* For the purposes of this Chapter,-

- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
- (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
 - (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
 - (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 - (ii) two hundred and forty days, in any other case....”

22. The petitioner in paragraph 3 of his statement of claim claimed to have worked for 240 days during the period of 12 calendar months preceding the date of his retrenchment. This claim of his having not been specifically disputed in the respondent's reply, deserves acceptance.

23. Since the petitioner had been appointed by the respondent the provisions of Section 25-G may not be attracted in his case and nor is there any such evidence showing any infringement of the said provision. Nonetheless, for the reasons discussed above the retrenchment of the petitioner under Section 25-N in itself is not sustainable and to that extent the action of the respondent in retrenching his services is illegal, arbitrary and unjust.

24. The Hon'ble High Court of H.P. while dealing with similar matters arising out of the awards passed by this Court in respect of the retrenchment relating to 1087 workmen of Dharampur Division in Mandi vide CWP No.302/2010 and other connected matters decided on 13.5.2010 has held the workmen entitled to a lump sum amount of Rs.50,000/- in lieu of back-wages, litigation expenses and compensation. To this extent the awards passed by this Court stand modified by the Hon'ble High Court. In view of the aforesaid circumstances and in order to avoid discrimination among the workmen, the petitioner shall be entitled to an amount of Rs.50,000/- in lump sum in lieu of back-wages, litigation expenses and compensation. The issue under discussion is accordingly held in his favour and against the respondent.

ISSUE 2

25. In view of what has been held under the foregoing issue, the petition is perfectly maintainable to the extent the same relates to the reliefs the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference in not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent.

ISSUE 3

26. The Ld. Dy.D.A. contends that there being inordinate delay in the steps taken by the petitioner for the redressal of his grievance, his claim suffers from the vice of delay and laches, which disentitles him to the reliefs he has prayed for. This contention, to my thinking, appears to be ill conceived. The question of delay and laches was considered by the Hon'ble High Court of Himachal Pradesh in Divisional Manager, Himachal Pradesh Forest Corporation, Division Sundernagar, District Mandi, H.P. vs. Dilu Ram (CWP No.95/2000 decided on 26.8.2004) wherein it was inter alia held:

“It is well settled that plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a mere hypertechnical defence though reference to the Labour Court can be generally questioned on the ground of delay alone. The provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay (See Ajaib Singh v. Sirhind Co-Op. Marketing-cum-Processing Service Society Ltd. 1999(82)FLR 137 (SC)).

27. Upon an industrial dispute having been raised by the petitioner, the Conciliation Officer-cum-Labour Officer, Mandi appears to have initiated conciliation proceedings. On failure of the conciliation move, the said Officer

referred the matter to the Labour Commissioner, Himachal Pradesh, vide his report No.9268, dated 12.10.2007. On the basis of this report, the Labour Commissioner referred the dispute to this Court under Section 10(1) of the Act, vide Notification No.11-23/84(Lab)1D/08-Mandi dated September 5, 2008. In view of the period of time that elapsed before the matter came to be referred to this Court, the petitioner who felt aggrieved by his unlawful retrenchment on July 8, 2005, cannot be said to have delayed the steps he took for the redressal of his grievance. His claim therefore does not suffer from the vice of delay and laches. So, the Ld. Dy.D.A.'s aforementioned contention merits rejection and is rejected. Not only this the illegal retrenchment and the permission granted thereto by none else but their own Chief Engineer had also come to be challenged by way of a Writ petition being CWP No.486/05 and therein to liberty had been granted to the workmen to take suitable action as per law. The issue under discussion is accordingly held against the respondent and in favour of the petitioner.

ISSUE 4

28. The respondent's allegation that the petitioner is guilty of suppressio veri, does not appear to be having a ring of truth, because the materials on record are not indicative of his having suppressed such fact(s) as may have a vital bearing on the case. The Issue on hand is therefore held against the respondent and in favour of the petitioner.

ISSUE 5

29. The rule of estoppel is not attracted in this case. The Ld. Dy. D.A. appearing for the respondent has also not been able to show how the petitioner is estopped from filing the claim petition. The issue under discussion is therefore held against the respondent and in favour of the petitioner.

RELIEF

30. Judged in the light of my findings on the issues above, the petition succeeds and is allowed in the following terms. The petitioner is held entitled to reinstatement with Rs.50,000/- as lump sum amount in lieu of back-wages, litigation expenses and compensation along with continuity of service from the date of his unlawful retrenchment (July 8, 2005). The respondent is directed to reinstate the petitioner forthwith. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after completion consigned to records. Announced in the open Court today this 20th day of May, 2010.

KR. CHIRAG BHANU SINGH,

Presiding Judge,

H.P. Industrial tribunal-Cum-

Labour Court, Dharamshala.

IN THE COURT OF KR. CHIRAG BHANU SINGH PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, DHARAMSHALA, H.P.

Ref No. : 10/2005

Date of Institution : 1-1-2005

Date of decision : 30-6-2010

Sh. Puran Chand son of Sh. Nanak Chand r/o village Syora P.O. Balt, Tehsil Sadar Distt. Mandi, H.P.

....Petitioner

Versus

The Executive Engineer, HPSEB(E) Division Sundernagar, District Mandi, H.P.

....Respondent.

Reference under section 10 (1) of the Industrial Disputes Act, 1947.

For the Petitioner : Sh. T.C. Sharma, adv.

For the Respondent : Sh. Tarun Pathak, adv.

AWARD

The following reference has been received from the appropriate Government for adjudication:

“Whether the termination of services of workman Sh. Puran Chand w.e.f. 25-8-1998 by the Executive Engineer, HPSEB, Electrical Division, Sundernagar, District Mandi, H.P. (Respondent) without complying the provisions of Sections 25 F, 25G & 25 H of the Industrial Dispute Act, 1947 & Rule 14(2) of certifying Standing Orders of H.P.S.E.B is justified or not? If not, what relief of reinstatement/regularization of services, back wages, seniority & other service benefit the workman is entitled to?”

2. The case set up by the petitioner in the statement of claim is that he was appointed as a beldar by the respondent board in Electrical Division Sunder Nagar, District Mandi on 4th of October, 1993. He was allowed to work continuously as such till 25 October, 1998. The petitioner was however given fictional breaks in between and as such was never allowed to complete 240 days in any of the years.

3. The work and conduct of the petitioner have been above board and nothing adverse was found against the petitioner during his service. He was further arbitrarily and illegally terminated on 25 August, 1998 and that too orally. The said act of the respondent was stated to be violative of the provision of Section 25-F of the Act (hereinafter to be referred as the Act) and 14 (2) of the Standing orders applicable to the HPSEB.

4. It is further the case of the petitioner that the respondent had retained persons juniors to him while ordering his termination, namely Prem Singh s/o Sh. Laturia Ram, Prem Singh s/o Sh. Besar Ram, Raj Kumar, Sita Ram, Tek Chand, Amar Singh, Rakesh Kumar and others. The respondent thus was stated to have not followed the principle of “Last Come First Go” and as such the termination was bad, being violative of even section 25-G of the Act. The petitioner thus sought his reinstatement with all consequential benefit.

5. While disputing the averment of the petitioner the respondent inter-alia raised the preliminary objection of the claim being barred by limitation, it being not maintainable and the petitioner having suppressed material facts from the Court. However on merit it is the case of the respondent that the petitioner was engaged as a dailywaged beldar w.e.f. 10/93 to 8/98 with certain breaks and interruption. He never completed 240 days in any calendar year. Moreover he had not turned up for work for about two and half years i.e. from June 1995 to November 1997. Even later the petitioner is stated to have abandoned the job after August, 1998. No juniors to the petitioner are alleged to have been engaged. Only those who had completed 240 days in a calendar year were engaged by the field staff. Moreover in the event of the continuous absence of the persons the field unit had taken work from the available persons.

6. While filing the rejoinder the petitioner controverted the averments in the reply and further reiterated those in the statement of claim.

7. I notice that the following issues come to be framed on 27-9-2005 by my Ld. Predecessor.

1. Whether the services of the petitioner were terminated by the respondent w.e.f. 25-8-98 without complying the provisions of Industrial Disputes Act, and standing orders in an improper and unjustified manner? ...OPP.
2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled to?OPP.
3. Whether the petition is barred by limitation? ...OPR.
4. Whether the petitioner is entitled to maintain the present petition as alleged? OPR
5. Whether the petitioner has not approached the court, as alleged? ... OPR.
6. Whether the services of the petitioner were dis-engaged due to non-availability of funds and work and on completion of work for which he was engaged? ...OPR.
7. Relief.

8. Having considered the pleadings, evidence and other attendant materials placed on record; my findings on the issues framed above are thus:

Issue No. 1	Yes
Issue No.2	Yes
Issue No.3	No
Issue No.4	Yes
Issue No.5	No
Issue No.6	No
Issue No.7	Allowed as per the operative part of the Award.

REASONS FOR FINDINGS

ISSUE No. 1, 2 & 6

9. All the three issues are being taken up together for discussion as they are co-related and intermingled:

10. The short and simple case set up by the petitioner is that his termination w.e.f. 25-8-1998 is violative of the provision of the Act, more particularly 25-F and 25-G and of the standing order framed by the respondent board. The respondent is further stated to have retained persons juniors to the petitioner while terminating his services and had thereby violated section 25-G of the Act. On the contrary it is pleaded by the respondent that the petitioner had never completed 240 days in any calendar year and had rather abandoned the job on his own. He was never terminated and as such the violation of the section 25-F or the standing orders does not arise. As far as the principle of "Last Come First Go" is concerned there is no categorical denial by the respondent in this behalf. In generalized terms the said fact is rather admitted by the respondent.

11. The petitioner while appearing as his own witness has reiterated the fact that his service were dispensed with illegally while retaining his juniors and that too by allowing them to complete 240 days in each calendar year. The petitioner in his cross-examination has further reiterated that the respondents have retained a few persons namely Rakesh Kumar, Amar Singh, Ganga Ram, Tek Chand, Prakash Chand Prem Singh s/o Sh. Besar, Prem Singh s/o Latoia Ram etc. who were junior to him.

12. On the contrary there is no specific plea that the appointment of the petitioner was for a specific project or a term though in generalized terms it is stated there in that dailywaged beldar were retained subject to availability of work/funds against specific schemes and on completion of the scheme there services used to come to an end automatically. The respondents witness RW1 Sh. Narender Kumar Thakur, Assistant Engineer Electrical Sub-Division HPSEB, Slapper though also has stated that dailywaged beldar was always retained subject to availability of work and fund against specific scheme but there is not evidence in his behalf led by the respondent to remotely show so. He has further deposed that the petitioner had left the job on his own in August 1998. Apart from his bald assertion there is nothing on record to substantiate the same. Admittedly per him no show cause notice or letter was issued to the petitioner to explain his willful absence. In fact the witness (RW1) was posted in Slapper Sub-Division on 2-4-2008. He has no personal knowledge about the petitioner having abandoned the job nor any documentary evidence had been placed on record in this behalf. As far as the invocation of the Principle of "Last Come First Go" is concerned the witness does not no anything about the same.

13. Except for the placing on record the mandays chart of the petitioner nothing has been placed on record. No seniority list or document have been placed on record to dispute the continuance of juniors by the respondent. During the course of arguments I had the occasion of going through the record and as per seniority list (as it stood on 30-1-2000), last person was employed by the respondent on 10-6-1998. It has not been categorically denied that the persons named in para (v) of the statement of claim were not junior to the petitioner.

14. Seeing to the mandays chart, no doubt the petitioner had not completed 240 days in the preceding 12 months of his termination and as such the provision of Section 25-F may not come to the rescue of the petitioner. However, it is more than apparent that the respondent had failed to prove the plea of abandonment. There is nothing on record that the petitioner had abandoned the job after 25-8-1998. The disengagement of the petitioner thus has to come within the ambit of "retrenchment". That being so, the respondent was duty bound to have followed the provisions of Section 25-G of the Act. It was not done in the present case. Moreover, it may be noticed at this juncture that the requirements of 240 days is not a condition precedent for the applicability of Section 25-G. Even if the workman has

not completed 240 days, he will be entitled to the protection of the section 25-G and 25-H. Thus the petitioner in any case was entitled to the aforesaid protection. While terminating the petitioner the respondent thus had to retrench the last persons to be engaged. It was admittedly not done in the present case. Not only this, in fact the respondent has engaged a fresh hand as far back as 10-6-1998. While resorting to retrenchment it was this person who had to go first of all. Thus the respondent had violated the provisions of section 25-G and as such action of the respondent is unsustainable in the eyes of law. Moreover the plea of abandonment sought to be raised has not been substantiated in any way, as is clear from the discussion held hereinabove.

15. For all the reason discussed above the petitioner is liable to be reengaged. It is however noticed from record that the petitioner had been absenting himself continuously for a period of about two and half years between the year 1995 and 1997. Though he has averred that the respondent had given fictional breaks to him but there is no conclusive evidence to hold so. More so, it could not be believed that the respondent would have given fictional breaks for years at a stretch. The petitioner has also not discharged his initial onus of proving that he was not gainfully employed after his termination. Thereafter in the peculiar circumstances the petitioner is not held entitled to seniority and backwages.

16. The foregoing issues are decided accordingly partly in favour of the petitioner.

Issue No. 4 & 5

17. In view of what has been held under the foregoing issues, the petition is perfectly maintainable to the extent the same relates to the relief the petitioner is found entitled to. Even otherwise nothing has been brought to my notice, as to why the reference is not maintainable. The issue on hand is accordingly held in favour of the petitioner and against the respondent

Issue No. 3

18. The materials on record are indicative of the petitioner having approached the respondent from time to time after his retrenchment and requested for his re-engagement but of no avail. Left with no option, he later raised an industrial dispute which came to be referred to this Court for adjudication under Section 10(1) of the Act, vide Notification No.11-23/84(Lab) I.D./04-Mandi dated 23 Dec. 2004.

19. In Divisional Manager, HPFC & another Vs. Garibu Ram, latest HLJ 2007 (HP) 1160, the delay of more than 10 years was held to have not come in the way of the workman whose services were illegally terminated. Having surveyed various rulings on the point, the Hon'ble High Court of Himachal Pradesh inter alia observed:

“ While taking note of the entire case law with regard to the delay and laches, this Court consistently has held that the provisions of the Limitation Act would not apply but, however, depending upon the facts and circumstances of each case, the principle of delay and laches have to be seen and applied. A delay of even 14 years has been held not to come in the way of the poor man, whose services have been illegally terminated in claiming his relief under the provisions of the Industrial Disputes Act. In Deepa Ram's case (supra), there was a delay of 12 years. In Ramesh Chand's case (supra) there was a delay of 9 years. In Mohinder Kumar's case (supra), there was a delay of 14 years.....”

20. The petitioner, who is undeniably poverty-stricken, is stated to be illiterate. In view of the facts and circumstances of this case, the principle of delay and laches cannot be held applicable to his case. The issue under discussion is therefore held in his favour and against the respondent.

RELIEF

21. For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner w.e.f. 25-8-1998 is set aside and quashed. He is directed to be reengaged forth with. The petitioner however shall not be entitled to seniority and back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.

Announced in the open Court today this 30th day of June, 2010.

KR. CHIRAG BHANU SINGH,
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Dharamshala,
H.P.
